STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF TENURE CHARGES	)	
	)	
- against -	)	
	)	OPINION
DAVID PETRELLA,	)	AND
Respondent-Teacher	)	DECISION
- filed by -	)	
	)	
HACKENSACK BOARD OF EDUCATION	)	
BERGEN COUNTY,	)	
District-Petitioner	)	
	)	
AGENCY DOCKET NO. 292-11/18	)	

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

John G. Geppert, Jr., Esq., Scarinci Hollenbeck, LLC
Matthew J. Donohue, Esq., Scarinci Hollenbeck, LLC

FOR THE RESPONDENT

Robert M. Schwartz, Esq., Schwartz Law Group, LLC

ALSO PRESENT

Rosemary Marks, District Superintendent

PROCEDURAL HISTORY

On November 12, 2018, District Superintendent Rosemary Marks ("Superintendent Marks") filed nine (9) tenure charges of unbecoming conduct and/or other just cause for dismissal against Respondent, a tenured Director of the Athletic Department, along with a sworn statement of evidence in support of the charges. (B. Ex. #1). On that date, Superintendent Marks also served Respondent with said charges and evidence. Specifically, Respondent was charged with committing conduct unbecoming in relation to:

1. Failing to Enforce Snow Day Protocol & Failure to Punch In;
2. Falsifying Time Records / Theft of Time;
3. Failing to Ensure Coaches had Current CPR/First Aid Certifications;
4. Making a Highly Inappropriate Comment about Teachers dating Students;
5. Failing to Properly Schedule Transportation for Athletic Events;
6. Failure to Properly Schedule H-Cops;
7. Failure to Ensure Supervision of Concessions' Stand leading to Injury of a Student;
8. Misrepresentation during Investigation of a Student Injury; and
9. Pattern of Unbecoming Conduct and Other Just Cause.

On November 27, 2018, after consideration of the charges and evidence against the Respondent, the Board found probable cause to credit the evidence warranting the Respondent's dismissal. As a result, the charges were certified to the Commissioner of Education, together with a Certificate of Determination pursuant to N.J.A.C. 6A:3-5. 1(b)(6). Additionally, Respondent was suspended without pay for 120 days, pursuant to N.J.S.A. 18A:6-14.

Respondent submitted an Answer to the Charges, denying a majority of the charges and allegations set forth therein. By letter dated December 13, 2018, Respondent denied all four (4) Counts of Charge One, "Neither admitted nor denied" Count One (1) of Charge Two and "left the Petitioner to its proof," denied Counts 2, 3 and 4 of Charge Two, denied all eight (8) Counts of Charge Three, neither admitted nor denied Counts 1 and 2 of Charge Four, and denied Count three (3), neither admitted nor denied Count one (1) of Charge five, and denied Count two (2), denied all five (5) Counts of Charge six, denied Counts 1, 2, 6, 7, 8, 9, 10 and 12 of Charge seven while neither admitting nor denying Counts 3, 4, 5 and 11, leaving the Petitioner to its proofs, denied both Counts of Charge eight and denied the sole Count of Charge nine (i.e., "Conduct Unbecoming a Teaching Staff Member and Other Just Cause").

In addition, the Respondent promulgated eight (8) affirmative defenses, including 1st, "all staff members are notified when schools are closed due to snow"; 2nd, "Respondent was told by a prior superintendent that as an administrator, who often had to leave his office, that he did not have to punch in when he arrived at school"; 3rd, "As to Charge Two, Count One, Respondent has already been disciplined"; 4th, "Coaches are assigned to supervise concession stands and are directed to solicit volunteers to assist"; 5th, "The allegations set forth in the Charges mischaracterize the facts and evidence"; 6th, "Respondent was assigned the duties of Supervisor of Health, Physical Education and Driver's Education, K-12 during the 2017-2018 school term without reducing any of the duties he was required to perform as Director of Athletics"; 7th, "Respondent

received effective evaluations of his performance as Athletic Director"; 8th, "Respondent reserves the right to interpose such additional affirmative defenses as may be appropriate based upon the parties exchanging discovery."

By letter dated December 21, 2018, Samantha L. Price, Director, Office of Controversies and Disputes, referred the Charges to the undersigned pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012, c.26 and P.O. 2015, c.109. The hearing commenced on February 20, 2019 and continued for five (5) additional hearing days, concluding on April 8, 2019. The record consists of thirty-seven (37) District Exhibits and eighteen (18) Respondent Exhibits, with sub-parts. The parties submitted post-hearing briefs dated April 29, 2019.

STATEMENT OF FACTS

Mr. David Petrella ("Petrella") served as the tenured Director of Athletics for the Hackensack School District from August 3, 2013 through March 23, 2018 when he was placed on suspension. He remained on suspension with pay until or about December 1, 2018 at which time the District certified tenure charges of unbecoming conduct.

Petrella had previously worked as a teacher in the School District, from which he graduated in 1987, from 1994-2005. He subsequently served as Dean of Students from 2005 to 2009, Assistant Principal from 2009 to 2011, and Middle School Principal from 2011-2013.

This matter culminated with the incident of January 9, 2018, when a student at the high school, K.D., was left alone at a concession stand by her aunt, the girls' varsity basketball coach, Michele Hammond-Dudley, without any

adult supervision. The student K.D. was severely burned by the hot water she was using to prepare and serve hot dogs. The charges cover a time period from May 1, 2014 (i.e., "Petrella failed or refused to utilize the time clock punch system") through January 9, 2018, with Charges seven and eight delineated as "Student 'K.D.' Burn Injury: Misrepresentation during Investigation."

The Hackensack School District has an extensive athletic program consisting of three levels of football, three levels of boys' soccer and three levels of girls' soccer, a girls' field hockey team, an ice hockey team, three levels of girls' volleyball, boys and girls cross country teams, three levels of boys' basketball and three levels of girls' basketball, a boys' indoor track team and a girls' indoor track team, a girls' bowling team and a boys' bowling team, a tennis team, three levels of baseball and three levels of softball, a boys swim team and a girls swim team, golf for women and for men, wrestling, and cheerleading. Each of these sports has coach, assistant coaches and volunteers. (Tr. @ 136, 155).

Petrella's job duties included but were not limited to scheduling all the games, arranging for transportation of all the teams, make certain that the programs under the aegis of the New Jersey State Interscholastic Athletic Association ("NJSIAA") comply with all of its regulations and requirements, and supervise and evaluate all the coaches. In total, there were 67 distinct job functions in the athletic director job description, not including sub-parts for which Petrella was responsible. (D. Ex. #1).

Beginning with the 2017-2018 school year, Petrella was assigned the additional job of being the Supervisor of Physical Education and Health for the District which entailed, inter alia, the supervision and evaluation of twelve (12) teachers at the high school. (Tr. @ 138). Every student at the high school – 2000 in total – is required to take physical and health education.

Petrella served without any assistants except for the Athletic Director secretary, Michelle Canestrino, and during 2017-2018, the District's former Supervisor of Physical Education, Ms. Sokolik, assisted with scheduling. (Tr. @ 499).

CHARGE ONE

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

Between January 1, 2014 and June 30, 2014, Petrella engaged in a series of unacceptable actions including, but not limited to, the following:

COUNT ONE

On or about February 3, 2014, Petrella failed to supervise, or failed to arrange for supervision of, the Hackensack High School ("HHS") Women's Basketball Team's use of school facilities for practice on a day on which District Schools were closed due to snow.

COUNT TWO

On or about February 3, 2014, Petrella failed to ensure that all coaching staff implemented the snow day protocol whereby no extra-curricular activities take place when there is school closure due to snow.

COUNT THREE

On or about February 3, 2014, Petrella's failures created a safety hazard for all students and staff who travelled to HHS to attend practice.

COUNT FOUR

On and after May 1, 2014, through May 31, 2014, Petrella failed and/or refused to utilize the required time clock punch system.

The foregoing constitutes conduct unbecoming a teaching staff member and warrants dismissal of David Petrella from his tenured employment.

District Position

The District, in support of Charge One, Counts 1-3, relies on the testimony of James Montesano ("Montesano'), the current principal of Hackensack High School ("HHS"). Montesano testified that the Respondent is responsible for ensuring that all coaches adhere to District protocols, such as not holding practice in the event of inclement weather. (Tr. @ 31). "On or about February 3, 2014, the women's basketball team held practice at HHS despite school being closed due to snowy conditions." By failing to ensure that all coaches enforced this protocol, the District maintains that the Respondent "created a hazard for the students and parents driving on the snowy road." (Tr. @ 30) (D. Ex. #2).

In Count 4 of Charge No. 1, the Respondent is charged with Conduct Unbecoming for failing and/or refusing to utilize the required time clock punch system for the period May 1, 2014 through May 31, 2014.

At the conclusion of 2013, the District appointed Karen Lewis as Superintendent of Schools ("Superintendent Lewis"). The previous Superintendent of Schools, Joseph Abate, had installed new time clocks that required every employee, including "administrators, para[professionals] and teachers" to swipe in and out. (Tr. @ 32).

Montesano testified that on or about June 6, 2014, Respondent received a warning for failing to utilize the time card system. According to Montesano, Respondent did not even swipe in once during May of 2014. (D. Ex. #3) (Tr. @ 35).

Respondent Position

For his part, the Respondent acknowledges that the snow day incident occurred. Montesano testified that the letter citing this incident was written by Petrella. (D. Ex. #2) (Tr. @ 157). Petrella testified that while he had nothing to do with the coach's decision to hold a practice on a snow day he had not spoken to him in advance. "I blamed myself because I didn't specifically [tell] him not to, that we can't be in the building on a snow day." (Tr.@ 766-767).

Petrella testified that he wrote the coach up for using the building when he shouldn't have and also for transporting students to the school, also when he shouldn't have. (Tr.@ 770-771). There was no further discussion with Montesano or anyone else from the central office on this issue.

Since the issue arose some six months after Petrella became Athletic Director and has never been repeated, the Respondent argues that this incident does not constitute conduct unbecoming.

Opinion

The Arbitrator finds that the District has met its burden of proof on Charge One, Counts 1-3, by a preponderance of the credible evidence. It is undisputed that a coach under the Respondent's supervision entered the building on February 3, 2014 and conducted a Women's Basketball Team practice, despite

the fact it was a snow day. This conduct undoubtedly created a safety hazard for these students and their parents who had to travel on the snowy roads to attend the practice.

The Respondent, absent evidence that he had informed the athletic coaches of the District's protocol on building use during "snow days and other school closures," properly accepted responsibility for this incident. Given the standard of unbecoming conduct, which requires the teaching/administrative staff member's adherence to students of good behavior that does not jeopardize the safety of the students, the Respondent's oversight with respect to the snow day protocol would meet this standard.

To the extent that the term "unbecoming conduct" can "encompass any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services," allowing students to attend a basketball practice during inclement weather, would fall within the parameters of such unbecoming conduct.

The fact that this type of incident occurred only once and shortly after the Respondent's appointment as Athletic Director, minimizes its significance, but does not excuse the misconduct. There were also no adverse consequences for the students.

Charge One / Count Four

Respondent Position

The Respondent acknowledges that this "incident" was memorialized by a letter from former Superintendent Lewis dated June 6, 2014.

The Respondent relies on the testimony of former Superintendent Joseph Abate, who was Superintendent when the time clock system was put in place. Superintendent Abate testified that "probably" in 2012 he discussed swiping in and swiping out with Petrella. Abate testified as follows:

> Q. And did there come a time when you discussed the swiping in and swiping out requirement with Mr. Petrella?
> A. Yes.
> Q. And do you recall about when that was?
> A. Probably 2012. Exactly when, I don't know.
> Q. And what did you tell him?
> A. Well, he actually had asked me whether he had to swipe in and swipe out on all occasions. And he explained to me, we had instituted the readers, the card readers, but they weren't on every door. So there would be occasion where Dave would be at one end of the building and he'd need to go somewhere right there, but for him to go out he'd have to walk to the other end of the building and swipe out. It wasn't practical. So we talked about that, and the last thing I was concerned about Dave Petrella was him cheating time from us.
> Q. Why do you say that?
> A. He was always around. I mean bottom line, my philosophy as a superintendent was I wanted to be visible, and I would go to all events, plays, shows, athletic events, debates, blue and gold dinners, et cetera, and Dave was always there. So I had no concerns about him taking time away.
> Q. Did you tell him that he didn't have to swipe in and swipe out?
> A. I did.
> Q. Was this when he was athletic director?
> A. I think this was in the transition when he was going to be athletic director, because I left mid year the year previous.
> (Tr. @ 714-715).

. Montesano testified that Petrella was often out of the building "more than most of us." Petrella testified that it was not unusual for him to be in and out of the building "three or four times in the morning alone." (Tr. @ 773). Montesano further testified that Petrella was not the only administrator to receive a letter of

warning similar to District Exhibit #3. There were no other letters issued to Petrella after June 2014 regarding his punching in or punching out.

Opinion

In the Arbitrator's opinion, notwithstanding the testimony of Superintendent Abate that he gave the Respondent a waiver or punching in/punching out pursuant to his position as Athletic Director, this waiver did not extend to punching in and punching out. Since Abate testified on cross-examination that Respondent would have to "swipe in from time to time anyway," his failure to not swipe in at all during May 2014 violated Superintendent Lewis' directive and thereby constituted insubordination as well as conduct becoming. (Tr. @ 717).

Petrella undoubtedly misconstrued Abate's waiver, which applied only to clocking in/out as he moved between and among buildings, but not to punching in the morning and punching out in the afternoon. Therefore, the Respondent's failure to punch in and out from May 1, 2014 to May 31, 2014 constituted a violation.

There is no evidence of Petrella's non-compliance with Superintendent Lewis' directive following the June 6, 2014 notice/warning he received from her that there would be no exceptions to the time clock punch system

Accordingly, the Arbitrator sustains Charge One/Count Four as rising to the level of conduct unbecoming.

CHARGE TWO

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

On and after January 1, 2015 through April 17, 2015, Petrella engaged in a series of fraudulent and deceptive acts including, but not limited to, the following:

COUNT ONE

Petrella personally "punched in" his Secretary in the District's electronic worktime program when his Secretary was not at work.

COUNT TWO

Petrella facilitated the criminal theft of public funds by causing false worktime records to be filed.

COUNT THREE

By falsely recording time records for the benefit of his Secretary, Petrella used his official position to secure unwarranted privileges and advantages for his Secretary.

COUNT FOUR

By falsely recording time records for the benefit of his Secretary, Petrella failed and/or refused to exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, contrary to standards of education ethics.

District Position

The District charges the Respondent with "theft of time" when on or about January 1, 2015, the Respondent began swiping in his secretary, Michelle Canestrino ("Canestrino") when she was late on numerous occasions throughout the year. (D. Ex. #4). As such, "the Respondent falsified her time records to show she arrived on time and was paid for time she did not work. Once the District discovered that the Respondent had "facilitated theft of public funds from

January 1, 2015 to April 2, 2015" rather than file tenure charges against the Respondent at that time, "it utilized progressive discipline." The Respondent was reprimanded and forfeited his increment for "fraudulent actions which resulted in the theft of taxpayer funds." (D. Ex. #4).

Respondent Position

The Respondent acknowledges that he engaged in the conduct for which he was disciplined. He described his motive for punching in Ms. Canestrino who was "going through a rough time. I thought I was helping a colleague who, once she was in the building, was fully effective and worked full time."

Most significantly, Petrella testified that he accepted the Stipulation of Settlement, which exacted the penalty of an increment withholding. At that time, both the District and Petrella agreed that this was the "appropriate sanction." (R. Ex. #5). In exchange for the agreed upon Settlement Agreement, Petrella was precluded from filing an appeal of the increment withholding. Conversely, Respondent asserts that the Settlement Agreement should "preclude the District from escalating the penalty that was agreed upon as part of the 2015 settlement."

With respect to the legal effect of a Settlement Agreement, the Respondent alludes to the following case law:

A settlement agreement between parties to a lawsuit is a contract. Pascarella v. Bruck, 190 N.J.Super. 118, 124, (App.Div.), certify. Denise, 94 N.J. 600, (1983). In general, settlement agreements will be honored "absent a demonstration of fraud or other compelling circumstances." Pascarella, supra,

190 N.J.Super. at 125, (quoting Honeywell v. Bubb, 130 N.J.Super. 130, 325 A.2d 832 (App.Div.1974). Before vacating a settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. DeCaro v. DeCaro. 13 N.J. 36, 97 A.2d 658 (1953).

Opinion

The District's inclusion of an incident that the parties had previously resolved through a Stipulation of Settlement constitutes a form of double jeopardy. As the Respondent correctly notes by including the "theft of time" charge in the charges promulgated by the District pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6a:3-5.1(b), the District has attempted to vacate the Stipulation of Settlement in order to impose a greater penalty.

Since the Respondent and District have accepted the terms of the Settlement and the Respondent has been penalized by having his increment withheld, there is no legal basis to revisit this issue. Not only would the District's action constitute a breach of contract, it would also violate the Respondent's due process and just cause rights contained in the NJ TEACH statute.

The decision of the Arbitrator to dismiss Charge Two based upon a double jeopardy defense is in accord with the decision of Arbitrator Licata in I/M/O Tenure Charges filed by the Borough of New Milford, Bergen County against Lawrence Henchey (Agency Docket No. 322-11/14). Although double jeopardy per se applies only in criminal cases, Licata found that "duplicative punishments, two separate disciplinary actions for the same offense, namely increment followed by the filing of tenure charges, is tantamount to double

jeopardy. Unlike a situation where the District withholds an increment shortly after filing tenure charges to ensure that the Respondent's salary is not increased in the period between the earlier filing of tenure charges and the issuance of the Arbitrator's decision regarding the charges, in the instant case the withholding of the increment via Stipulation of Settlement preceded the filing of tenure charges by three years.

Accordingly, Charge Two is dismissed.

CHARGE THREE

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

Between September 1, 2015 and June 30, 2016, Petrella engaged in a series of inappropriate conduct including, but not limited to, the following:

COUNT ONE

On or about February 9, 2016, Petrella failed and/or refused to notify then Superintendent Karen Lewis that the coach being discussed by the two of them over the phone was actually in the room with Petrella during the discussion.

COUNT TWO

On or about February 9, 2016, Petrella reached out to the then Superintendent to challenge a decision which she and the HHS Principal had made regarding certain athletes.

COUNT THREE

Petrella did not require the coaches providing services in the District during the 2015-2016 school year to maintain their required certifications and training requirements, including but not limited to CPR, blood borne pathogens, and concussion training.

COUNT FOUR

Petrella allowed coaches with incomplete and/or out-of-date certifications and trainings to provide services to District students.

COUNT FIVE

Petrella's failure to ensure that the District's coaches maintained their current certifications and trainings placed District students in danger of physical harm.

COUNT SIX

On or about March 31, 2016, Petrella misrepresented to the then Superintendent and to the HHS Principal that the certifications of all coaches were up-to-date. In reality, more than one-half of the coaches had expired CPR certificates.

COUNT SEVEN

Petrella's failure to ensure that the District's coaches maintained current certifications and trainings violated N.J.S.A. 18A:40-41i.

COUNT EIGHT

Petrella's failure to ensure that the District's coaches maintained current certifications and trainings violated the New Jersey State Interscholastic Athletic Association ("NJSIAA") Coaching and Certification Regulations.

The foregoing constitutes conduct unbecoming a teaching staff member and warrants dismissal of David Petrella from his tenured employment.

District Position

In its post-hearing brief, the District has focused on Counts 3-8 of Charge Three. The District maintains that it discovered in Petrella's third year as Athletic Director that he "had allowed numerous coaches' certifications (e.g., CPR; concussion, etc.) to expire. (D. Ex. #6). These certifications were required by NJSIAA to ensure that all coaches are properly certified."

On or about March 31, 2016, Superintendent Lewis conducted a spot check of Respondent's files and determined that a majority of the coaches had at least one (1) or more expired certifications. Montesano testified that the Respondent did not have the certifications on the date of the inspection but

maintained that he had electronic records of all up-to-date coaches' certifications. (Tr. @ 47). Superintendent Lewis issued Respondent a letter of reprimand for Respondent's negligence in "having [his] coaches improperly certified for several seasons."

On June 1, 2016, Montesano completed a summative evaluation of Petrella. Under Areas for Growth, Montesano wrote: "Needs to be more proactive with CPR certifications, student medical clearance, and other student and coaching mandated requirements. A spot check by our Central Office revealed many expired certifications and requirements. Additionally, eligibility lists need to be correct and ensure that all students meet State requirements." (D. Ex. #21). Subsequently, it was discovered that a student was not medically cleared to play football during the 2015-2016 season. (Tr. @ 54).

Montesano testified regarding the importance of ensuring that all coaches' certifications are up-to-date, and Respondent's allegedly false statements on March 31, 2016 as follows:

> JGG: What is your understanding of the purpose of…coaches hav[ing] proper certificates in CPR?
>
> JM: First and foremost,…it's the protection of our students, to ensure that in the event of any sort of medical emergency, [the coaches] are able to be the first responders. But it's also to protect the District in the event something does happen, we can…say that [the coaches] were certified and trained properly.
>
> JGG: Do you believe that he violated the District's expectations with respect to being honest about these requirements?
>
> JM: It seemed like it at the time, yes. (Tr. @ 59-60).

Ms. Canestrino, the Administrative Assistant to the Athletic Director for over 20 years, testified that she began working with Petrella in 2013. She described working with Respondent as "challenging" and "frustrating" due to his lack of organization. She received complaints from various coaches and parents regarding Petrella's failure to properly schedule athletic events or maintain current records indicating if a student was academically and medically cleared to participate in sports. (Tr. @ 251-252).

Canestrino created a spreadsheet of all coaches' names, certifications and the date of expiration for each certification. (D. Ex. #24). She testified that she created the spreadsheet on or about July 2015 and it would indicate if one (1) or more certifications were set to expire during the upcoming year. (Tr. @ 264). If a coach or Respondent forwarded her an electronic copy of a certification, Canestrino would create and file a physical copy to be kept in Respondents office. (Tr. @ 256). On the spreadsheet, Canestrino would indicate if a coaches' certification was either expired or not on file by writing "NEED" in red ink. (Tr. @ 265). According to her spreadsheet, approximately twenty-four (24) coaches' CPR certifications were marked "NEED." (D. Ex. #24). One of those twenty-four (24) coaches, Kelvin Presciaco, resigned during the fall of 2015. Prior to the start of each school year, Canestrino would present and discuss the spreadsheet with Respondent.

Canestrino testified that Superintendent Lewis conducted a spot-check of Respondent's records on or about March 31, 2016 due to an impending "QSAC" inspection. (Tr. @ 258). Canestrino recalled that Respondent became "frantic"

after the Superintendent's visit, and noted that nineteen (19) coaches that had been marked as "NEED" completed one or more certifications in April of 2016. (Tr. @ 272). Prior to the March 31, 2016 visit, Canestrino was not aware of Respondent having any plan to correct the coaches with expired certifications. (Tr. @ 273). Respondent also sent correspondence to thirty-seven (37) coaches, which stated in pertinent part "your AED/CPR certificate has expired[.]" (D. Ex. #26). Canestrino did not note any difference in Respondent's behaviors after he was assigned the Supervisor of Physical Education responsibilities on or about July 1, 2017, and testified that she was just trying to survive Respondent's inability to perform his duties day-to-day. (Tr.@ 283-84).

On cross-examination, Canestrino explained that she was never required to keep electronic records of coaches' certifications, and Respondent did not begin electronically maintaining the certifications until after Superintendent Lewis' visit. (Tr. @ 296).(emphasis District).

Respondent Position

Petrella testified that he told his coaches at "every preseason meeting" to obtain certifications and keep them up to date. Reference was made to emails he sent to coaches with a link to the NFHS courses which instructed coaches to email him and Canestrino documentation that they had completed the course(s). (R. Exs. #12, #13). Such emails were sent on August 14, 2014, December 22, 2014, January 13, 2015, January 15, 20154, May 26, 2015, August 13, 2015, April 9, 2016, April 19, 2016, May 16, 2016 and July 1, 2106. (R. Ex. #19).

The Respondent raised procedural objections to the admission of District Exhibit No. 24 as follows:

Q. Thank you. And if we could turn to what's a new document for us. Exhibit 24.

MR. GEPPERT: And your Honor, I just note for the record this is one of the documents we produced since the last hearing.

MR. SIMMELKJAER: District 24 for identification.

Q. Take a moment to look it over.

MR. SCHWARTZ: I just want to put an objection on the record.

MR. SIMMELKJAER: Yes.

MR. SCHWARTZ: I understand that it's difficult to get documents. These charges were filed sometime during the fall. The evidence attributed to the charges were attached to the charges. We propounded interrogatories, we got answers to interrogatories. Those documents, if they're relevant to the charges, they should have been part of the charges when they were filed. The Rules require that whatever the evidence is in support of the charges be filed with the charges. This is supplemental. I'm not sure if the Rules allow for that. And that we received them I think on March 4th and March 5th. It's not supposed to be a moving target, and that's what this is. And I would object on that basis.

MR. GEPPERT: Your Honor, I would say the City of Hackensack Board of Education is a large school district. I can say I didn't prepare these charges, so I obtained them in midstream. But we are continuing to make a good faith effort to find every document that you and Mr. Schwartz request, and that's what we're providing in the process. This information is directly relevant, we provided it to Mr. Schwartz. Certainly information can be provided after the initial period and used for rebuttal purposes or redirect or at other times in the hearing.

I think for the sake of efficiency that we should do it all at once when we have a witness here, rather than, as I said before, bringing people back two or three different times, just depending on the development of the hearing.

MR. SIMMELKJAER: Well, the essence of Mr. Schwartz's objection, as I understand it, is that this is material that should have been provided at the time the charges were filed. It was information that the District knew or should have known was relevant to the charges. That was his objection. And to that particular objection you say what?

MR. GEPPERT: I say that we didn't have that information available, and certainly we didn't have it in hand at the time to provide it or we would have done that, and I provided it as quickly as I can. As I mentioned earlier, some material I received last evening and I immediately presented it to Mr. Schwartz. If he needs a recess to examine it or something, I don't have an objection to that.

MR. SIMMELKJAER: Well, I just want to be clear that there's not going to be a rolling presentation of documents that the District has in its possession at this time. I'm going to admit this, because I don't see how the Respondent is prejudiced by this particular exhibit. (Tr. @ 259-261)

The Respondent notes that the memorandum from Superintendent Lewis dated April 29, 2016 indicates that she visited Petrella on March 31, 2016 to review the files of the coaching staff and that 23 of the 44 coaches "listed" had expired CPR certificates and they were not current in other areas as well. According to Respondent, "the memorandum did not have any list attached to it. Ms. Lewis did not testify in this proceeding. The Tenure Charge as it was filed did not have any list attached. So, at the filing of the Tenure Charge, Mr. Petrella did not have any information as to who were the coaches who allegedly did not have their certifications. It wasn't until objectives were made to the hearsay nature of the April 29, 2016 memorandum that a 'list' was presented, that being D-24 which represents a list that was put together by Ms. Canestrino."

The list was submitted after the hearing began, contrary to N.J.A.C. 6A:3-5.1(b). Mr. Petrella maintains that the list should not be considered, as this

document was certainly available to the District at the time the charges were compiled and filed. "The administrative code provision requires the sworn statement of charges to align with the sworn statement of evidence, all of which must be submitted with the tenure charges."

Petrella had no recollection of receiving the list compiled by Canestrino. (Tr. @ 790). Also, Superintendent Marks acknowledged that she had not seen it prior to the filing of the tenure charges. (Tr. @ 550).

The Arbitrator admitted D. Ex. #24 on the ground that it provided "specificity and additional detail for a charge that was clearly on the record since the commencement of this proceeding." In this regard, Count Seven alleges that "Petrella's failure to ensure that the District's coaches maintained current certifications and trainings violated N.J.S.A. 18A:40-41i." Count Eight alleges that "Petrella's failure to ensure that the District coaches maintained current certifications and trainings violated NJSIAA Coaching and Certification Regulations."

The District's explanation for the late submission of District #24 was set forth above.

Opinion

In retrospect, D. Ex. #24 should have been excluded because its submission violates N.J.A.C. 6A:3-5.1(b), Filing of Written Charges and Certificate of Determination. It states:

> (b) In all instances of the filing and certification of tenure charges, except charges filed against a teacher, principal, assistant principal, or vice principal for reasons of inefficiency pursuant to N.J.S.A.

18A:6-17.3, the following procedures and timelines shall be observed:

1. Charges shall be stated with specificity as to the action or behavior underlying the charges and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

Since Petrella, at the time the charges were filed, did not have access to the "list" prepared by Canestrino. Respondent's defense was adversely impacted. Notwithstanding the explanation of the District, it should have had access to a document prepared in July 2015.

Assuming the admissibility of District Exhibit #24, several errors in the document were identified during the cross-examination of Superintendent Marks. For example, Superintendent Marks acknowledged that Coaches Brkovic, Hopkins and Gerard Carol Jr. had their CPR certifications current notwithstanding the notations in Canestrino's chart. (R. Exs. 19a, 19b, 19e). Similarly, Coaches Izzo's CPR Certificate was due to expire in 11/2017. (R. Ex. #198). Coach Keller had a valid CPR Certificate due to expire 9/21/16; McKaba's Certificate was valid until 11/2017. (R. Exs. 19g/19h). Also, Coaches Mendoza, Preciado, Reddan, Rhymar, Scott and Timmins had valid CPR Certificates at the time Superintendent Lewis inspected his files.

There undoubtedly remained coaches who had expired certificates after Superintendent Lewis' March 31, 2016 visit. Petrella took corrective action when he sent a letter, dated April 5, 2016, to several coaches reminding them to

update their certifications. As of November 2016, the NJSIAA reviewed Hackensack's Athletic Program, including coaching certifications, and found that all concussion, NFHS, all CPR/AED and First Aid certificates were in compliance. In addition, the evaluation Petrella received from Montesano after the April 16, 2016 memo was satisfactory for the 2015-16 year.

Notwithstanding the exclusion of D. Ex. #24 and the Respondent's denial that twenty-three (23) coaches' CPR certifications had expired, the Respondent nevertheless acknowledged that eight (8) certifications had expired. (Tr. @ 844). From the Respondent's own spreadsheet, he acknowledged that the CPR certificate of Anthony Immediate expired in December of 2015 and Mr. Immediate resigned "at the end of the session." (D. Ex. @25). As a result, Mr. Immediate coached for two (2) months without a proper CPR certification.

Respondent also violated the NJSIAA and State regulations by failing to ensure coaches received Basic First Aid training. According to Respondent's "Updated Coaches Certification" spreadsheet, over eight (8) coaches had not completed the First Aid training course as of April 29, 2016 (I.e., the spring sports season). These eight (8) coaches coached from September 2015 through March 2016 without the required First Aid Certifications and in violation of NJSIAA regulations. (D. Ex. #19).

In the final analysis, even with the exclusion of District Exhibit #24, there is preponderant evidence that Respondent committed unbecoming conduct by endangering the health and welfare of students by violating State statute, NJSIAA regulations and Board policy. Despite the fact that no student was

injured as a result of these violations and by November 2016 NJSIAA determined that all coaching certifications were in compliance, the Respondent nevertheless failed to fulfill his responsibilities as Athletic Director and thereby risked the health and welfare of the student athletes.

Accordingly, Charge Three, Counts 3-8 are sustained.

Charge 3, Counts 1-2

District Position

In Charge Three, Counts 1-2, the Respondent is alleged to have committed a breach of trust by lying to Superintendent Lewis. On or about February 9, 2016, Respondent called Superintendent Lewis to discuss an ongoing student issue involving the Boys' Basketball Team. The entire team was threatening to quit if the Boys' Basketball Coach, Mr. Taylor, did not resign.

Respondent and Coach Taylor believed the students should be punished, but Superintendent Lewis and Principal Montesano made an administrative decision to take no action. (D. Ex. #5). During a phone call with Respondent, Superintendent Lewis was openly discussing her concerns with Coach Taylor's actions. Unbeknownst to the Superintendent, Coach Taylor was listening to the conversation and neither Respondent nor Coach Taylor informed her of this fact. (D. Ex. #4). Superintendent Marks testified that this was a violation of confidentiality and insubordination. Respondent's inappropriate actions were memorialized in a memorandum. (D. Ex. #5).

Respondent Position

Respondent testified that first Montesano and Lewis had a discussion without his presence. Montesano then had a discussion with Petrella and the students. When Petrella was told of the Superintendent's decision, he called the Superintendent, who was out of the District at the time. (Tr. @ 193). According to Petrella, his conversation with the Superintendent took place outside of the presence of Montesano. Since Montesano did not hear the discussion, was not present for the discussion, did not know who was in the office, and did not know if Petrella and the superintendent were on the telephone speaker, Montesano had no personal knowledge of the conversation. The conversation was not on speaker phone. (Tr. @ 786).

Contrary to the February 18, 2016 memo that Superintendent Lewis sent to Petrella, he denied that Coach Taylor was in the outer office during his conversation with Lewis. (Tr. @ 787). Respondent further testified that Superintendent Lewis "was not a fan of mine" and demeaned him by calling him "little boy." On the advice of an NJPSA field consultant, he did not file a grievance.

Opinion

The Arbitrator is not persuaded that the District has met its burden of proof on these two counts by a preponderance of the evidence. Since neither Superintendent Lewis nor Coach Taylor testified Montesano's uncorroborated hearsay account of the incident, it is insufficient to sustain this charge. Montesano testified that he only surmised that Petrella was on speaker phone or

if Coach Taylor was outside the office based upon what Superintendent Lewis had told him.

Accordingly, Charge Three, Counts 1 and 2, are dismissed.

CHARGE FOUR

District Position

The Respondent is charged with making a "highly inappropriate comment" during a 2017-2018 "meet and greet" session for new staff members. District administrators, including Respondent, were tasked with introducing themselves to new staff members, explaining their responsibilities and what it meant to be a part of the Hackensack family." (Tr. @ 67). After introducing himself to the approximately thirty (30) staff members, Respondent inexplicably stated that if a staff member wants to date a student, "just wait until they graduate and then marry them." (D. Ex. #7) (Tr. @ 71-72).

Montesano testified that at least six (6) individuals approached him regarding this comment, including the President of the Hackensack Educator's Association, two assistant principals, the Director of Guidance, and two other staff members. (Tr. @ 69).

On or about September 7, 2017, Montesano issued Respondent a letter warning Respondent for making this inappropriate comment. (D. Ex. #7).

Respondent Position

Respondent, for his part, testified that he had never before attended a meeting like this and was given only four minutes notice before he entered the room. (Tr. @ 823-824). In his recollection, he told the teachers, "if you want to

keep your job, make sure you take good attendance, always have your lesson plans and have nothing to do with the students. Don't have any kind of social media, no Instagram, no Facebook, no contact with students. If you want to date a student, wait until they're out of high school and then marry them." (Tr. @ 824).

Petrella testified that he realized once the statement left his mouth he wished he could take it back." He then explained that "his wife had been a student in the Hackensack High School, that they became engaged in 2001 and they were married in 2001." He also testified that in the prior school year, a teacher had lost her job because she had ongoing relationships on Facebook and in person with students." (Tr. @ 826, 835).

The Respondent notes that he did provide good advice, no one testified regarding any complaints received by the District, and he regretted that he had made the statement. Respondent concluded that "even if it was too glib of a remark to have made, it does not rise to the level of conduct unbecoming warranting dismissal."

Opinion

The District has proven Charge Four by a preponderance of the credible evidence. The inappropriate remark made by the Respondent to a group of new teachers tended to cast the District in a bad light. As such, it constituted conduct unbecoming because it could have the tendency to affect the morale of the new teachers or the school district staff at large. To the extent that a member of the school board heard the statement and individuals outside the school district complained, public respect for public school employees could be diminished.

However, the Arbitrator notes that no specific complaints were presented at the hearing via testimonial or documentary evidence.

In making the inappropriate remark, which the Respondent acknowledges, Petrella deviated from the standard of behavior and the trust accorded teachers and school administrators in their capacity as role models. Although Petrella intended to impart good advice by injecting humor into his presentation, he exercised very poor judgment and engaged in unbecoming conduct.

Accordingly, Charge Four is sustained.

CHARGES FIVE AND SIX

(Failure to Schedule H-Cops and Bus Schedules)

CHARGE 5

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

On and before September 6, 2017, Respondent engaged in inappropriate conduct including, but not limited to, the following:

COUNT ONE

Petrella is responsible for the scheduling and security of the athletic events in which students participate. Part of that responsibility includes coordination with the Hackensack Police Department for provision of Hackensack Police Officers at events. Petrella notified the Hackensack Chief of Police and provided a schedule of events at which Police would be needed. September 6, 2017 was identified as a date on which Police were needed for a football game.

There was no football game scheduled for Wednesday, September 6, 2017. There was a football game scheduled for September 8, 2017, a Friday night, the night of the week on which virtually all HHS football games are scheduled.

COUNT TWO

Petrella's negligence resulted in several Hackensack Police Officers arriving at HHS on September 6, 2017 to provide security for the non-existent game.

The foregoing constitutes conduct unbecoming a teaching staff member and warrants dismissal of David Petrella from his tenured employment.

CHARGE SIX

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

In and after September, 2017, Respondent engaged in inappropriate conduct including, but not limited to, the following:

COUNT ONE

Petrella was responsible for arranging a bus tour of the City of Hackensack for new staff members. The bus which was to have been scheduled did not show up. Petrella failed to take any appropriate action to confirm the event with the transportation vendor and to engage in any follow-up with the vendor or an alternative vendor.

COUNT TWO

Petrella cancelled four athletic events during the 2017-2018 school year but failed to cancel the transportation for those events:

a. October 9, 2017 Tennis;
b. December 12, 2017 Basketball
c. January 31, 2018 Cheerleading; and
d. March 18, 2018 Baseball.
e.

Petrella also ordered two buses rather than one bus for a March 25, 2018 Baseball game.

COUNT THREE

Petrella's errors with regard to transportation for the events noted in Count Two caused the Board to have to compensate the driver(s) for each event in an amount equal to not less than three hours' pay for not driving.

COUNT FOUR

Petrella's errors with regard to transportation for the events noted in Count Two caused the Board to not be able to assign driver(s) to other events, thus requiring additional staffing and incurring twice the costs for the same time period.

COUNT FIVE

Petrella's errors with regard to transportation for the events noted in Count Two caused the driver(s) assigned to the cancelled events to have missed out on other driving assignments to events of longer duration for which they could have earned greater compensation.

The foregoing constitutes conduct unbecoming a teaching staff member and warrants dismissal of David Petrella from his tenured employment.

District Position

Superintendent Marks testified regarding a memorandum, dated September 7, 2017, issued to the Respondent for scheduling several H-Cops (Volunteer Police Officers) to provide support for a High School football game erroneously scheduled for September 6, 2017. The letter of reprimand was issued by Montesano and noted that Respondent's "June 21 Memo to the Captain of the H-Cops indicated that they were to attend a game on September 6th." Montesano further admonished Petrella for his lack of organization and advised him to "confirm the dates as we get closer to the event." (D. Ex. #7).

Superintendent Marks testified that Petrella's actions "were a waste of a valuable resource, and resulted in damaging the relationship between the District and the Municipality." (Tr. @ 425). She further testified as follows:

> RM: Administrators have to plan, prepare, and be organized… Unfortunately, it's a real issue for [Respondent]…it was a memo that [Respondent] had sent to the captain of the H-Cops "indicating that they were to attend a game on September 6."…[B]etween June 21st and then the week of implementation of a plan mean [he should have] verified [the schedule was accurate.] …That's absolutely a required function of our administrative duties, and so that's a major problem. This speaks to the continued issues [Respondent] has.

With respect to the bus scheduling, Superintendent Marks, after testifying that Petrella was responsible for the scheduling of transportation for athletic events, recalled that he had "failed to accurately update or record bus schedules on multiple occasions. He also failed to order a bus for new staff members during the 2017-2018 orientation. (Tr. @ 428, 431).

Respondent Position

The Respondent acknowledges that the date in his email was incorrect. The actual date for the football game was September 8, 2017. By characterizing the error as Petrella's negligence, the Respondent asserts that the District has acknowledged that the conduct involving a "clerical mistake" was not conduct unbecoming.

The Respondent maintains that District Exhibit No. 8 – the letter from Montesano to Petrella - is incomplete because "it neglected to include the complete email and who it was sent to. Respondent's Exhibit No. 18 notes that the email was not only sent to 'Dean' as set forth in the document that is attached as D. Ex. #8 but also to his coaches and to Mr. Montesano."

Petrella testified that he copied Montesano on every "weekly athletic schedule" and noted that at no point prior to September 6, 2017 was he contacted by Montesano or anyone else concerning the erroneous date.

With respect to Charge 6, namely that Petrella "failed to take any appropriate action to confirm" the bus tour that the superintendent had asked him to arrange for new staff members, Petrella recalled that the bus tour was supposed to have occurred on August 31st. When the superintendent called to

tell him that the bus had not arrived, Petrella testified that he called Louis Granada, who told him the bus would arrive there in 5 minutes. When he showed Ms. Marks the text from Granada, she was "unhappy" and told him to cancel it.

The Respondent produced a text message showing that he had confirmed the bus tour on August 7th with Granada, and Granada knew that he was needed to drive a bus for "new teachers as part of their orientation."

Similar incidents are cited in Charge 6. Petrella is alleged to have failed to cancel transportation for a October 9, 2017 tennis tournament. Unbeknownst to him, this was a "date we got rained out at New Milford with the JV bus and I didn't get the call that we were rained out until the following day." He "assumed that the coach had told" the bus driver Flavio Carangua. (Tr. @ 836).

The next specification involves a bus that was not cancelled when the basketball game in Englewood, NJ on December 12, 2017 was cancelled at 3:12 p.m. Petrella testified that he had learned it was cancelled from the bus driver. (Tr. @ 838).

A cheerleading practice was cancelled on January 31, 2018 without the Respondent being informed.

A baseball game on March 18, 2018 was notated as being cancelled by Petrella, although he could not recall why it was cancelled, but assumed it apparently occurred at the "last minute." (Tr. @ 840).

The last item in Charge 6 refers to the ordering of two (2) buses rather than one for a March 25, 2018 baseball game. However, this order was made on March 25th after Petrella had already been suspended. (Tr. @ 841).

The Respondent argues that since he was responsible for over 600 bus routes per year and responsible for coordinating approximately 550 away games, the bus scheduling errors in 2017 constitute a "miniscule percentage of all the away games and events that he had to coordinate and schedule. As with so much of these charges, the errors noted don't constitute conduct unbecoming."

Opinion

The Arbitrator is not persuaded that the errors in bus and H-Cops scheduling rises to the level of conduct unbecoming. Given the number of bus schedules the Respondent was responsible for, a certain percentage of cancellations for various reasons could be predicted. While there is evidence that Respondent did not have in place the most efficient system for scheduling and confirming buses and alerting H-Cops and others when schedule changes became necessary, the Arbitrator concurs with Respondent in finding that these clerical and/or administrative oversights, some of which were not solely attributable to Respondent, did not rise to the level of conduct unbecoming. There is also the mitigating circumstance of the Respondent workload, which entailed extensive scheduling responsibilities, without a full-time assistant, exacerbated by the addition of supervising the Health and Physical Education Department.

There is no evidence that the H-Cops' mishap or the buses that were late cancelled adversely impacted the morale of the Hackensack School Community or demonstrated that Petrella had violated the accepted standards of good behavior. The Arbitrator concurs with Respondent in finding that these errors do not constitute conduct unbecoming as that disciplinary standard is generally understood, but are more relevant to an efficiency charge which is not before the undersigned.

Accordingly, Charges 5 and 6 are dismissed.

CHARGES SEVEN AND EIGHT

CHARGE SEVEN

CONDUCT UNBECOMING A TEACHING STAFF MEMBER

From September 1, 2017 through January, 2018, Respondent engaged in inappropriate conduct including, but not limited to, the following:

COUNT ONE

Petrella is responsible for ensuring that athletic events are properly supervised by coaching staff, athletic trainers and security. Petrella's responsibility includes supervision of the snack bar. Notwithstanding their coaching responsibilities, Petrella assigned Assistant Coaches to be present at the snack bar and supervise the individuals working therein.

In or about September, 2017, Petrella made changes to the HHS girls' basketball coaching roster. These changes included making Assistant Coach Michelle Hammond the Head Coach. Petrella failed and/or refused to secure an alternate to supervise the snack bar during HHS girls' basketball games.

COUNT TWO

By virtue of this failure, from the beginning of the girls' basketball season, the snack bar, which utilized cooking appliances and involved the exchange of monies, was allowed to operate without appropriate staff supervision.

COUNT THREE

On or about January 9, 2018, despite now being Head Coach, Coach Hammond opened up the snack bar before a scheduled girls' basketball game, and had her niece, student K.D., assist her. Approximately one-half hour before the scheduled start of the game, Coach Hammond left the snack bar so that she could coach the team. No replacement supervisor appeared and student K.D. was left unsupervised.

COUNT FOUR

During the game, student K.D., who was not supervised in the snack bar, burned her lower leg/ankle when she spilled boiling water from a steam tray used to cook hot dogs and keep them hot. The injury resulted in an extremely large blister.

COUNT FIVE

The on-site athletic trainer, who is subject to Petrella's supervision responsibility, treated the burn with only ice and a band-aid. K.D. subsequently required emergency room treatment.

COUNT SIX

Petrella's failure to protect K.D. from injury violated Principle (, Paragraph 4 of Board Policy 3211 (Code of Ethics).

COUNT SEVEN

Petrella's failure to ensure that K.D. was provided prompt and appropriate medical assistance violated Board Policy 8441 (Care of Injured and All Persons).

COUNT EIGHT

Petrella did not notify the HHS Principal of the incident. Only after being contacted by Central Office did Petrella notify Mr. Montesano by telephone, three days after the incident had occurred.

COUNT NINE

Petrella did not submit, nor did he direct a subordinate to submit, any Accident Report or Incident Report until after having to be directed to do so by the Superintendent of Schools.

COUNT TEN

Petrella did not ensure that his staff promptly reported the injury.

An Accident Report was not filed until January 16, 2018, one week after the injury to K.D.

COUNT ELEVEN

An Accident Report was not filed until January 16, 2018, one week after the injury to K.D.

COUNT TWELVE

Petrella's failures to ensure that the incident was promptly reported violated Board Policy 8442 (Reporting Accidents).

The foregoing constitutes conduct unbecoming a teaching staff member and warrants dismissal of David Petrella from his tenured employment.

District Position

Superintendent Marks testified that on or about June 30, 2015, the District Administration reviewed and updated numerous job descriptions, including the Athletic Director position. (D. Ex. #27) (Tr. @ 433). Among the duties listed for the Athletic Director at that time was "supervis[ing] the athletic trainer, supervising the coaching staff, supervis[ing] the concessions stand, assign[ing] bus drivers for athletic events, and displaying the highest ethical and professional behavior." (D. Ex. #1).

Prior to the 2017-2018 school year, the Respondent was assigned the additional responsibilities as Supervisor of Physical and Health Education. Superintendent Marks addressed the Respondent's workload concerns by hiring Ms. Sokolik, the District's former Supervisor of Physical Education, to assist Petrella with scheduling. Superintendent Marks testified that the additional responsibilities Petrella acquired as a result of the District-wide restructuring were no more onerous than those undertaken by other employees. In response to the Arbitrator's questions, she testified as follows:

Arbitrator: As compared to other directors, I guess they would be the comparable group that he's been analogized with, how many full time teachers did the science supervisor have to evaluate and observe?

RM: Over forty individuals.

Arbitrator: And Respondent had thirty full time teachers plus coaches to evaluate?

RM: Yes. (Tr. @ 495-496).

Moreover, Superintendent Marks testified that the Board had conducted research on similarly-sized boards of education and concluded that the increased responsibilities, which came with an increased salary, could be handled by a single individual. (D. Ex. #36) (Tr. @ 501).

On January 12, 2018, Superintendent Marks testified that she learned that a student had been burned on school grounds three (3) days prior or on January 9, 2018. (Tr. @ 445). She first heard about the injury from Andrea Parchment, the Assistant Superintendent, who had learned of the injury from an anonymous phone call. (Tr. @ 445). She then called Montesano, who had also just learned of the incident from Petrella. Superintendent Marks next proceeded to conduct an investigation to determine the facts and the reason that the injury had not been reported more promptly.

At approximately 9:52 p.m. on January 15, 2018, Superintendent Marks received a memorandum from Respondent recounting his recollection of the events. (D. Ex. #11) (Tr. @ 450). However, despite the memo, incorrectly dated "December 1, 2017," the Superintendent testified that she "was still completely in the dark about the facts."

Respondent's memorandum was inconsistent regarding when he first learned about the injury. Whereas Respondent's memorandum stated that he first learned of the injury on January 10th, Montesano had informed the Superintendent that "this was contradictory to an earlier statement in which Respondent stated he knew of the injury on January 9th. (Tr. @ 453-454).

On January 19, 2018, Superintendent Marks held a meeting with Montesano and Petrella to clear up the confusion. According to Marks, Petrella was contradictory "in our meeting…I still could not figure out from [Respond[ent]…whether [Respondent] was really there on January 9th or not. It was back and forth…I was very concerned that things kept changing." (Tr. @ 447).

Superintendent Marks concluded that "Respondent's actions after the injury showed an alarming lack of concern for the wellness and safety of students at athletic events, and there was a complete communication breakdown by the Respondent in reporting the injury." (Dist. brief @ 26) (Tr. @ 459-468). She continued:

> It was unclear throughout the conversation from January through the time [Respondent] was suspended [if Respondent] had been there the evening [of the injury]…[Respondent] never communicated initially with the principal or with the central office. The assistant superintendent was the one who asked me, for the first time, if I had been aware of a serious burn of a child at the high school[.]…All accident reports should be filed within 24 to 48 hours, maximum. An accident of this nature – should have been filed immediately. (Tr. @ 468-469).

Following the January 19, 2018 meeting, Montesano issued Petrella a letter outlining his concerns with Petrella's actions. (D. Ex. #14). On January 22,

2018, Respondent submitted a rebuttal. (D. Ex. #15). However, the Superintendent deemed problematic Petrella's position which fully placed the blame on Hernan Castano, the part-time athletic trainer "when [Respondent] was well within his rights to seek out that athletic trainer…and demand the accident report so that [Respondent] could follow up accordingly." (Tr. @ 474-475). Pursuant to her concern, Superintendent Marks testified that:

> Our children deserve more, and dismissing the level of administrative responsibility that we have in our positions is an egregious violation of…public trust. We all are responsible for upholding that trust and protecting children. (Tr. @ 477).

Referring to District policies, the District asserts that "K.D. should have received emergency medical treatment and been sent to the hospital immediately." (D. Ex. #17) (Tr. @ 478). According to Superintendent Marks, Respondent's actions were a clear violation of multiple Board Policies.

Superintendent Marks considered the Respondent's actions as lacking candor throughout the entire investigative process. Moreover, she deemed his behavior to be dishonest and egregious. (Tr. @ 81). Shortly thereafter, on March 23, 2018, Superintendent Marks suspended the Respondent based on the January 9, 2018 injury of K.D. (Tr. @ 525). On or about November 28, 2018, Superintendent Marks filed tenure charges against Respondent "due to the accumulation of unprofessional behaviors and unbecoming conduct throughout the past six (6) years."

Ms. Michelle Hammond-Dudley, Head Coach of the Basketball team, and the aunt of the injured student K.D., testified that prior to K.D.'s injury in 2018, she was unaware that Respondent was responsible for the supervision of the

concession stand. (Tr. @ 310). Pursuant to District policies and protocols, she understood that in the event of an injury to a student, athlete or spectator, the injury would be reported to the athletic trainer and/or Respondent in a timely manner. (Tr. @ 310).

On January 9, 2018, Hammond-Dudley opened and operated the concession stand at the start of the Girls' Basketball game and her niece K.D. was working at the stand. Once the game started, she instructed K.D. to continue operating the concession stand while she coached the game.

At half-time, Hammond-Dudley discovered that K.D. was injured from the boiling water from the hot dog steam tray. (Tr. @ 312-313). K.D. stated that she was treated by the athletic trainer and called her mother to pick her up from the game immediately thereafter. Hammond-Dudley testified that K.D. told her that she had spoken to Respondent prior to getting treatment for her injury as follows:

> MHD: I called her mom and told her that K.D. advised me [her injury] was taken care of, and once the game is over, I will attend to it. [K.D.] had advised me that she told Mr. Petrella[.] (Tr. @ 313).

Later that evening, Hammond-Dudley spoke with Respondent regarding K.D.'s injury and Trainer Castano's subsequent treatment. She recalled telling Petrella on January 9, 2018 that K.D.'s foot was burned by scalding water at the Basketball game. (Tr. @ 315, 317, 336).

On cross-examination, Hammond-Dudley testified that she was unaware of the exact circumstances surrounding the injury, but reiterated that she informed Petrella on January 9th. (Tr. @ 335). On January 10th, she spoke to Castano regarding K.D.'s injury, directed him to complete the injury report and to

contact Respondent regarding his recollection of the injury and treatment. (Tr. @ 343). Also, on January 10th, she spoke to Petrella and continued to text him updates throughout the week regarding K.D.'s status.

Respondent Position

The Respondent initially challenges the District's assertion that he had the responsibility to supervise the concession stand. The job description indicating that one of the responsibilities of the Athletic Director was to supervise the concession stand was introduced as District Exhibit No. 27 after the commencement of the hearing. It purports to represent the minutes of the June 30, 2015 Board Meeting, wherein approximately 80 job descriptions were adopted, including the job description for Director Athletics. Although Superintendent Marks testified that all these job descriptions were part of Superintendent Lewis' merit goals, the Respondent maintains that "absent her testimony there is no linkage between D-27 and D-1. The actual job description is dated April 2015 but it does not have an adoption date by the District."

Petrella testified that he reviewed the job description (D. Ex. #1) in September 2007 when he assumed the combined title of Athletic Director and Supervisor of Physical Ed and Health, but he had no recollection of Item 19 having to do with supervising the concession stand. (Tr. @ 940). Petrella disputed the District's contention that supervising the concession stand was one of his duties as Athletic Director.

The District could neither produce the job description that preceded D. Ex. #1 nor a policy regarding concession stands.

In this connection, Ralph Dass, who was the Director of Athletics from 2009-2012, testified that he had never been tasked as Athletic Director with supervising concession stands. Nor had he ever "seen a policy or anything given to me [as] to what is the proper procedure "for concession stands." As Athletic Director, he never assigned anyone to oversee concession stands. (Tr. @ 660, 663). Moreover, when he became Athletic Director, no one sat down with him to review his responsibilities.

Montesano was unclear as to whose responsibility it was to supervise concession stands. He testified that the responsibility was to ensure that protocols and safety procedures were followed – "but just for basketball events." (Tr. @ 27). Concession stands at football events were supervised by the Director of Student Activities. Petrella acknowledged that football had its own protocol for concession stands. They were supervised by "senior class advisors." The concession stand for the two big track meets of the year were the responsibility of the head coach. The other sports did not have concession stands.

Insofar as basketball concession stands were concerned, Petrella testified that the head coach would decide whether or not they would open a concession stand. "If they thought they would have a big crowd, if they could actually make some money, they would open it." (Tr. @ 759). Typically, Petrella said an adult would be present. (Tr. @ 761). Petrella had followed this protocol since he became Athletic Director in 2013 and had never been told by Montesano or any superintendent that he was not following the current protocol.

Given this protocol, for the game of January 9, 2018, the head coach of the girls' varsity basketball team, Ms. Hammond-Dudley, testified that she followed the protocol which had been in effect since 2012 – before Petrella became the Athletic Director. She would open the concession stand, leave, and just have the students run it without supervision. (Tr. @ 323-326).

Hammond-Dudley testified that she had brought a pan of hot water to warm up another pan of chicken that she had cooked for the "girls." She said the burner was off. She remained at the concession stand for 10 to 15 minutes before leaving for the game.

In her testimony, Hammond-Dudley said that at "half-time" she learned that K.D. had injured herself. She recalled meeting with K.D. during half-time and asking her what had happened. K.D. told her that she had spilled some hot water on her foot. At this point, Hammond-Dudley testified that K.D. told her that she had already seen the trainer and that she had called her mom. Hammond-Dudley testified that she also called K.D.'s mother. "I called her mom and told her that K.D. advised me that the situation as taken care of, and once my game is over, I would attend to it." Hammond-Dudley further testified that K.D. had advised her that "she told Mr. Petrella also."

After the game was over, Hammond-Dudley "went to K.D." and asked her if "everything was o.k." At this point, Hammond-Dudley told K.D. that she was "going to clear the concession stand and call her mom to come and pick her up." (Tr. @ 313). She described K.D.'s injury as a bright red spot on top of her foot.

The Respondent deems noteworthy that Hammond-Dudley did not mention speaking to the trainer that evening. (Tr. @ 330).

Next, Hammond-Dudley recalls speaking to Petrella after the game, telling him that K.D. had burned herself, that K.D. had seen the athletic trainer and that she (Hammond-Dudley) had called K.D.'s mother. (Tr. @ 315). Shortly thereafter, the fire drill happened. (Tr. @ 315).

According to Hammond-Dudley, when she told Petrella about K.D.'s injury, his response "to me [was] as if he already knew, that it was already brought to his attention." (Tr. @ 316). K.D.'s mother had come to pick her up as the fire alarm was going off and that K.D.'s mom said that she would stay in contact with her.

Asked to reiterate what she told Petrella, Hammond-Dudley testified, "I do recall telling him that night when it happened and I will keep in touch with him, once I've heard from her mother. Because I did advise her mother to please look over and watch it and see what happened, especially in the morning."

On cross-examination, Hammond was uncertain as to what she allegedly told Petrella that evening. She testified, "I would not know what happened." (Tr. @ 336, 338).

The following morning, January 10th, Hammond-Dudley recalled that she had spoken to K.D.'s mother who had texted her a picture of K.D.'s ankle. (D. Ex. # 10). Hammond-Dudley advised K.D.'s mother to take her to the doctor "A.S.A.P." and then she texted Petrella the picture of K.D.'s injury and advised him that K.D. was going to the doctor. According to Hammond-Dudley, Petrella

only told her to "keep in touch." (Tr. @ 319). After that, K.D.'s mother stopped communicating with Hammond-Dudley.

Hammond-Dudley did not have a copy of the alleged text she purportedly had sent to Petrella, but she said that she could get it from the phone company. The District did not receive a copy of these texts. Hammond-Dudley could not explain why the text records produced by Petrella had no entries from her until January 16th when he texted her to have K.D. come to the nurse's office to fill out an accident report.

In her testimony, Hammond-Dudley also stated that she had spoken to the trainer after the January 9th incident, and that Castano should call Petrella "because I was not fully aware of what totally happened." (Tr. @ 342). Interestingly, she testified that she never asked Castano what had happened.

The Google document that was part of Petrella's misdated memo "is completely at odds with Hammond-Dudley's testimony." He testified that when Montesano contacted him on the morning of January 15, 2018 and told him that Superintendent Marks had requested a complete report by January 16th, he called Hammond-Dudley.

According to Petrella, it was only at this point that Hammond-Dudley told him what had occurred.

In her written version of what had occurred, written six days after the incident, Hammond-Dudley indicated that K.D. had come to her and informed her of what had occurred at the end of the game – not at half-time as she had

testified. "In fact, she wrote that she reprimanded K.D. 'most of all' because she had waited to tell her what had occurred until after the game."

Contrary to her testimony that she didn't know what had occurred, "in the Google document she said that K.D. told her she had moved a *burning sterno tray* with a steam pan of boiling water and spilled it herself. In her testimony, in addition to stating that she was not totally aware of what had occurred, Ms. Hammond also said that the burners were off when she left KD. That's not what she said in her written Google document. Respondent argues that "there is nothing in her written statement that even suggests that K.D. had told Petrella what happened, that she had a conversation with Petrella, or that she had a conversation with the trainer either on the evening of the incident or at any time thereafter."

Petrella's Testimony

Petrella recalls arriving at the gym on or about 6:15 p.m. The junior varsity game was underway. The varsity game had not started.

When he walked in from the pool area, he did not see the concession stand. He said the concession stand was in a "cut out area, maybe 6-feet deep inside of the cinder-block wall." (Tr. @ 830). He sat in the bleachers and never went to the concession stand. He did not see Coach Hammond-Dudley at the concession stand.

Petrella acknowledged that he had seen K.D. that evening. "I was sitting in the bleachers…and she walked past me with a sock rolled down onto the front of her toes, so the heel was exposed." (Tr. @ 857-858). Petrella said that he

told her – K.D. – that you can't go outside with your sock rolled up. He told her that there is salt on the ground. She responded by telling him that she had dropped something on her foot. He told her to roll up her sock and go see the trainer. This was the extent of his interaction with K.D. that evening. K.D. did not tell Mr. Petrella that she had burned herself. He did not see her after this encounter. Petrella said that he hadn't spoken to the trainer. He was not aware that K.D. had burned herself. (Tr. @ 858).

Petrella further testified that almost immediately after the game there had been a fire alarm. Once the building was evacuated, in 15 minutes, the firemen gave the all-clear signal to go back into the building. He went back into the building along with Hammond-Dudley. He helped her grab her jacket and whatever else she was carrying out to her car. He denied that the coach had told him that evening what happened to K.D. (Tr. @ 856).

The following day, on January 10, 2018, Petrella spoke to Coach Hodge, the assistant to Coach Hammond-Dudley. Coach Hodge told Petrella that a girl "got burned selling hot dogs." At this point, Petrella assumed that "she grabbed a hot dog" and "heat through the tin foil burned her fingers." Next, Petrella called Hammond-Dudley and Montesano. He called Montesano on at least three (3) occasions on January 10th and 11th but did not get a call back." (Tr. @ 859).

When he spoke to Hammond-Dudley on January 10th, she told him that the girl who got burned was her niece, that K.D. and that her niece didn't tell anyone because she didn't want to get her "Auntie" in trouble. At this point, Petrella thought she had burned her finger.

Petrella didn't call Castano because he didn't believe that he was working that day.

When Petrella spoke to Montesano on January 12th he told him that K.D. had burned her fingers while selling hot dogs at the concession stand. Montesano did not indicate that he also had a conversation with Coach Hodge. Montesano neither asked him if an accident report had been filed nor told him to file an accident report. He did not ask Petrella if he had spoken to K.D. or to K.D.'s mother.

The next time Petrella heard from Montesano was via text that Superintendent Marks had called him about the "child that was burned during the girls' basketball game." According to the text, the hospital had called DYFS. Montesano indicated that Mr. Marks wanted a report the following morning, including what had happened to K.D. after the injury.

Petrella then called Hammond-Dudley, who gave him a complete account of the incident followed by the Google document. He incorporated the Google document into his own account.

He concluded his letter by stating that henceforth the concession would no longer sell hot food and that it will be supervised by the Girl's Basketball Parents Club.

In his letter, Petrella recounted what Hammond-Dudley had told him on January 10th, that he had also spoken to Coach Hodge on January 10th and that he understood that K.D. had burned her fingers selling hot dogs. He relayed this information to Montesano when he spoke to him on January 12th. He sent the

email on January 15th to Ms. Marks and Mr. Montesano. Superintendent Marks questioned where Petrella had received his information concerning DYFS. The accident report was filed the following day, January 16th. (D. Ex. #13).

Petrella testified that he had never completed an accident report. He was told that only the athletic trainer, Ms. Skiba, and the nurse fill out the report.

On January 22, 2019, Petrella received Montesano's memo of the same date. (D. Ex. #14). He wrote his response dated February 15, 2018. On February 20th, he received his first unsatisfactory evaluation from Montesano. Montesano asserted that Petrella had a "blind eye" towards safety. Petrella wrote a rebuttal to his proposed evaluation, including procedures for how concession stands were to be run in the future, and an emergency action plan for reporting injuries at athletic events. (R. Exs. #10, 11 and 12). On March 23, 2018, the Respondent was suspended.

Testimony of Montesano

With respect to the District's claim that Petrella did not inform the principal after he had his conversation with Coach Hodge on January 10th, the Respondent notes that Montesano also spoke to Hodge on January 10th. It is noteworthy that after speaking to Hodge Montesano also believed that K.D. had burned her finger. "…I think he [Coach Hodge] just said that she burned her finger or something." (Tr. @ 203). Montesano did not call Petrella with this information because Hodge told him that he had already spoken to Petrella. Montesano neither instructed Hodge to fill out an accident report nor reached out

to Hammond-Dudley for an explanation. He neither spoke to Castano, who treated K.D. nor the athletic trainer, Skiba, who signed the accident report.

Montesano had no information that would establish that Petrella found out about the accident before January 10th. (Tr. @ 209). Montesano acknowledged that he had never gone over what the procedures were for supervising concession stands and who was responsible with Petrella or any of his predecessor Athletic Directors. Montesano could not explain why he went along with assigning Petrella the additional duties of Supervisor of Physical Ed and Health when, in Petrella's February 2018 evaluation, he had been critical of his organizational skills.

Testimony of Mr. Canistrino

Mr. Canistrino attended the January 9th game where she saw K.D. She overheard someone saying that K.D. had dropped something on her foot. She didn't hear that K.D. had burned herself. (Tr. @ 299-300).

Testimony of Superintendent Marks

The investigation conducted by Montesano at the Superintendent's direction omitted that Montesano had spoken to Hodge on January 10th, omitted a statement from Hodge, omitted a statement from Hammond-Dudley other than her Google document incorporated in Petrella's letter, and no statement from Castano. "No action was taken with respect to Ms. Hammond, even though Ms. Marks said she had an obligation to report the incident to Mr. Montesano." The Respondent questions the assertion that he should have exercised "due diligence" when the principal, who had the same information, was not proactive.

Since Petrella, during the 4.5 years he served as Athletic Director, had never encountered an injury of this kind, he disputed Superintendent Marks' contention that he was "not vigilant in protecting students – in promoting student safety."

With respect to the District's allegation that Petrella had the obligation to submit the accident report, both Petrella and Dass testified that it was up to the coach or trainer to submit. Since both Hammond-Dudley and Castano had a reporting obligation, Respondent notes that neither was cited for discipline, except for the letter of reprimand Petrella filed against Castano. (R. Ex. #4D).

By excluding all of the actors in this matter – the coach, the trainer and the principal – the Respondent argues that "the District's primary motivation here was not to promote safety for students, but to use this incident as a vehicle to end Mr. Petrella's career."

Opinion

Charges Seven and Eight constitute the crux of the District's case against Petrella. Although seven additional charges are included in the tenure case, three of which, Charges Two, Five and Six have been dismissed by the Arbitrator, and two of the charges, Charge One and Charge Three (Counts 1 and 2) had been previously the subjects of official reprimands, Charges Seven and Eight are pivotal.

The incident which precipitated the filing of Tenure Charges was the January 9, 2018 injury to K.D. and the Respondent's alleged failure to properly supervise the concession stand at the Girls' Basketball game on January 9, 2018, his alleged failure to provide appropriate medical assistance following

K.D.'s burn injury, his failure to submit an Accident or Incident Report within 48 hours, and his alleged misrepresentation of the facts during the investigation of the incident.

In essence, the gravamen of these numerous counts in Charges seven and eight can be reduced to what did Petrella know and when did he know it.

The first issue is whether Petrella, as Athletic Director, was responsible for the supervision of the Girls' Basketball concession stand. Although there is some variance in the District's practice with respect to the responsibility of the Athletic Director to "supervise concessions at athletic events," this responsibility is undoubtedly listed as Item #19 in the Job Description for Athletic Director dated April 2015. Notwithstanding the Respondent's valid observation that there is no clear linkage between the minutes to the Board meeting (D. Ex. #27) where the 80 job descriptions were adopted (D. Ex. #1), including Athletic Director, testimonial evidence that the Respondent reviewed the job description in September 2017 suffices for the purpose of notice and preponderant proof of Charge Seven, Count One.

Whereas the Respondent should have known that the supervision of concession stands fell under his supervision, there is substantial evidence that as far back as 2009, this function was not directly undertaken by the Athletic Director but rather delegated to the Basketball Coach. Given this longstanding practice, it was incumbent upon the central office administration to review his job duties once the job description of Athletic Director was updated. The fact that neither Principal Montesano nor Superintendent Lewis reviewed the

Respondent's job description following his appointment in 2013 or Superintendent Marks following the restructuring in 2017 mitigates his responsibility to some degree.

In addition, the unrebutted testimony of Ralph Dass, who was the Athletic Director from 2009 to 2012 as well as a coach for 29 years, was that the task of supervising concession stands was delegated to the head coach or some adult entity such as the "senior class advisors" for football. The ambiguity with respect to the operation of concession stands is evident in the testimony of Principal Montesano, to whom the Respondent reported. It was not clear to Montesano whose responsibility it was to supervise the concession stands. His testimony that the Athletic Director was responsible to ensure that protocols were followed but just for basketball events is a matter he admittedly did not discuss with Petrella. Adding to the confusion is Montesano's testimony that the concession Stands at football games were supervised by the Director of Student Activities is at odds with Petrella's understanding that these concession stands were supervised by "senior class advisors."

In the absence of a clear policy or protocol for operating concession stands, Petrella's decision was to follow what he understood to be the protocol in delegating to Coach Hammond-Dudley the responsibility for operating the concession stand at the Girls' Basketball game on January 9, 2018. His decision was not unreasonable inasmuch as Respondent never received any contrary directions regarding his responsibility for the operation of concession stands.

On balance, the Arbitrator sustains Count 1. It is undisputed that on January 9, 2018, Coach Hammond-Dudley opened the concession stand before the start of the Girls' Basketball game and remained there for 5 to 10 minutes. She then left to coach the basketball game and left her niece, K.D. alone and in charge. Hammond-Dudley had left K.D. with a pan of boiling water to heat up hot dogs. She testified that the burners were off when she left K.D.

Respondent is guilty of Count 2 because he allowed the concession stand to operate utilizing cooking appliances without proper supervision. Once Petrella delegated the function of operating the concession stand to Hammond-Dudley it was incumbent upon him to ensure that it was operated safely, which included ensuring that there was adult supervision at all times.

He is also guilty of Count 3 because the Head Coach was allowed to leave the concession stand without an adult replacement supervisor. While he adhered to the past practice of delegating this function to the head coach, he still retained the responsibility and accountability for ensuring the activity was supervised by an adult. Since the Respondent assumed, by virtue of his job description, overall responsibility for the supervision of the concession stand, he is guilty of Counts 2 and 3, but not Counts 4 and 5.

The Arbitrator dismisses Count s 4 and 5. Petrella was not responsible for K.D.'s injury or her treatment thereafter by the athletic director. While Petrella, in his capacity as Athletic Director, was indirectly responsible for all incidents that resulted from his inadequate supervision, he cannot be held directly responsible for the actual injury of K.D. or her subsequent treatment. The treatment provided

by Trainer Castano, using ice and a band-aid was, was his own medical judgment. It took place outside of the Respondent's view or direct supervision.

Unlike the District, the Arbitrator is disinclined to take the quantum leap of assuming that Petrella should have known when he saw K.D. limping across the floor on January 9th that she didn't burn her fingers. However, he only acquired this erroneous information from Hodge on January 10th.

The Respondent is guilty of Count 6. Board Policy 3211 (Code of Ethics) places responsibility on all staff, including the Athletic Director, to "make a reasonable effort to protect the students from conditions harmful to health and safety." By allowing the concession stand to operate without adult supervision, Petrella did not make a reasonable effort.

Counts 7-12

Since the Respondent did not receive credible feedback from his subordinates regarding the incident on January 9th, he is not responsible for the delayed reporting on that date.

According to Hammond-Dudley, she learned at "half-time" that K.D. had injured herself by spilling some boiling water on herself. At this point, Hammond-Dudley recalled that K.D. told her she had already seen the trainer and that she had called her mother to pick her up. Hammond-Dudley testified that she also called K.D.'s mother. "I called her mom and told her that K.D. advised me [her injury] was taken care of, and once the game is over, I will attend to it." She also testified that "[K.D.] had advised me that "she told Petrella." (Tr. @ 313).

This aspect of Hammond-Dudley's account is not credible. Her testimony that she learned about K.D.'s injury at "half-time" is contradicted by her Google document, which Petrella incorporated in his misdated letter to Superintendent Marks. The Google account clearly states that "[a]t the end of the game, [K.D.] came to me and relayed to me that she had called her mom because she burned herself." K.D. also informed Hammond-Dudley at that point that she had seen the trainer. In her Google document, written on January 15th, six days after the incident, Hammond-Dudley reprimanded K.D. "most of all" "because she didn't inform me when the accident happened right away. She advised me at the end of the game. She said that she didn't want to bother me while I was coaching."

Contrary to Hammond-Dudley's testimony at the hearing, there is nothing in her written statement which suggests that K.D. told Petrella what happened or that she had a conversation with Petrella. There is also nothing in the Google document that she had a conversation with the trainer, Castano, at any time.

Given these discrepancies between Hammond-Dudley's testimony and written statement, the Arbitrator finds no credible evidence that Hammond-Dudley told Petrella anything about K.D.'s injury on January 9th. There is no credible evidence she told Petrella at half-time, after the game when she learned about the injury herself, or during the evening fire drill. On cross-examination, it became evident that Hammond-Dudley had not conveyed to Petrella on January 9, 2018 that K.D. was burned by scalding water at the Basketball game. She testified as follows:

Q. You indicated you spoke to Mr. Petrella that evening.
A. Right.

Q. When did you speak to Mr. Petrella?
A. Well, after I spoke with the girls, we came out and I spoke to him. And then the fire drill went off, and then we went outside and we were talking.
Q. So it was after you spoke to the girls you spoke to him, the fire drill happened, and then during the fire drill you spoke to him, as well?
A. We went outside, yes.
Q. During the fire drill do you have specific duties as a staff person?
A. I have to make sure that everyone is out of the building. As a teacher, period. I have to make sure everyone is out of the building.
Q. And you were outside with Mr. Petrella you said?
A. Yes.
Q. And you had a discussion with Mr. Petrella?
A. Yes.
Q. And you indicated that K.D. was injured?
A. Yes.
Q. Did you indicate to him how K.D. was injured?
A. I was just aware of it because K.D. told me herself.
Q. But were you aware of what happened? This is on January 9th.
A. Right. On January 9th I was aware of what happened, and Mr. Petrella assumed to me that he was aware of what happened because we were having a conversations. And I told him, "I called her mother and she was on her way." And I turn around and I say, "Oh, there go her mother right there."
Q. And you're saying you assumed he knew what happened? I think that's what you just said.
A. Because we were talking about it. So K.D. got injured and her mom is on her way to pick her up. I called her mom.
Q. Did you tell Mr. Petrella what happened?
A. I really did not totally know what happened.
Q. So you didn't tell Mr. Petrella what happened?
A. I did tell Mr. Petrella what happened.
MR. GEPPERT: I object. She's testified she did tell Mr. Petrella.
MR. SIMMELKJAER: Let's clarify her answer. The last question was: Did you tell Mr. Petrella what happened? And then you said at some point you didn't know what happened. So the question is –
THE WITNESS: Well, I knew that K.D. was injured. That is what we had the discussion about, K.D. was injured. Okay? She had the burn. I informed him that I called her mother and that she was on her way to pick her up.
Q. Did you tell Mr. Petrella what happened?
A. I would not know what happened.
Q. So, therefore, you didn't tell him what happened because you didn't know?
A. I told him about the injury.

Q. You said she was injured.
A. Right.
Q. But you did not know how it was happened, correct?
A. I was told by K.D. that Mr. Petrella and the athletic trainer knew what happened.
Q. Did you have a conversation with the athletic director about what happened that evening, January 9th?
A. I don't understand what you're asking.
Q. Did you have a conversation with the athletic director that evening, January 9 –
A. I spoke with the athletic director.
MR. GEPPERT: This has been asked and answered about six times.
MR. SIMMELKJAER: But there's some ambiguity here, so I guess I want to give Mr. Schwartz some latitude here. The witness did not directly observe what happened. Apparently K.D. told her what happened to her, right?
THE WITNESS: Yes.
MR. SIMMELKJAER: And that information that K.D. told to you is that she had gotten what, scalded?
THE WITNESS: She had spilled some water on her and burned herself.
MR. SIMMELKJAER: That's a scald from the water.
THE WITNESS: Right.
MR. SIMMELKJAER: And that was the extent of your knowledge at the time.
THE WITNESS: Exactly.
MR. SIMMELKJAER: You didn't know if she flipped something over or anything like that, you just knew she was scalded.
THE WITNESS: Yes.
MR. SIMMELKJAER: Is that the information you gave to Mr. Petrella when you went outside?
THE WITNESS: I said, "K.D. informed me what has happened. I notified her mom. Her mom is on her way to pick her up."
MR. SIMMELKJAER: Did you tell Mr. Petrella what had happened, though, that she had scalded herself?
THE WITNESS: K.D. advised me that she burned herself, yes.
MR. SIMMELKJAER: Does that help?
MR. SCHWARTZ: I don't know.
Q. Did you have a conversation with the trainer?
A. I did not. (Tr. @ 334-338).

Based on the foregoing exchange, the Arbitrator is persuaded that Hammond-Dudley never told Petrella about K.D.'s injury at any time on January 9, 2018 (half-time, after the game, or during the fire drill). Superintendent Marks

has held Petrella accountable for not timely informing her about K.D.'s injury. On January 12th, Superintendent Marks first learned about the injury from Andrea Parchment, the Assistant Superintendent, who had learned about the injury from an anonymous phone call. Shortly thereafter, Ms. Marks launched an investigation to determine the facts and ascertain the reasons for the delay in reporting.

The District has found the Respondent's belated acknowledgement at the hearing that he had seen K.D. prior to the evacuation lacking in candor. He testified:

> Respondent: She was limping across the floor in front of me. I was sitting on the bleachers in the first row, which is right on the floor, and she walked past me with a sock rolled down onto the front of her toes so that her heel was exposed…[T]here was salt on the ground, so I explained to her "You can't go outside with your sock like that. You've got to roll it up. There's salt on the ground." She told me she dropped something on her foot. I told her, "Look, roll up your sock and go see the trainer." The trainer was on the opposite side of the court. (Tr. @ 857-858).

Apparently, since Petrella did not convey his observations of K.D. to Hammond-Dudley, knowing that she was the coach's niece, the District has accused him of indifference or lacking due diligence. According to the District, Petrella should have investigated her condition, although he did tell K.D. to "go see the trainer…on the opposite of the court." Since Petrella had no knowledge that K.D. had burned herself and K.D. misled him by stating that she "dropped something on her foot," the Arbitrator finds that Petrella's advice that she see the trainer was reasonable and sufficient at the time. However, the Respondent

could have been more assertive and walked K.D. over to the trainer to ensure she received proper assistance. Clearly, at that point, K.D. was concerned about getting "Auntie" – Ms. Hammond-Dudley in trouble. It was not until January 15th in her written account did Hammond-Dudley tell Petrella that K.D. had moved a tray of hot water and spilled it on her ankle.

Respondent is also guilty of Count Seven because he did not reach out to K.D. or her mother once he learned about the injury from Hammond-Dudley and Hodge. Even though Hammond-Dudley minimized the seriousness of the accident, with her "no big deal" comment, it was incumbent upon Petrella to verify this information. Respondent witness, Ralph Dass, testified that even if he was informed that a student who had been injured "was going to be fine," he nevertheless would have "called that student down, find out from them. Let their parent know and get any help they needed."

Based on the totality of the Respondent's conduct on January 9th, vis-à-vis' K.D., the Arbitrator finds him guilty of Count 7.

The credible evidence indicates that Petrella first learned the particulars of K.D.'s injury on January 10th when he spoke to Coach Hodge. Coach Hodge told Petrella that a girl "got burned selling hot dogs." At this point, Petrella accepted the account that "a girl got burned selling hot dogs. 'I figured, she grabbed a hot dog' and 'heat through the foil burned her finger.'" Next, on January 12th, Petrella spoke to Montesano and Hammond-Dudley. Unbeknownst to the Respondent, Hodge had also spoken to Montesano, leaving him with the same impression

that K.S. had burned her finger." As he testified, "…I think he [Coach Hodge] just said she burned her finger or something." (Tr. @ 203).

There is no evidence that Petrella had any knowledge of K.D.'s injury before January 10th. Montesano testified that he had no information that would support Petrella's awareness of the incident prior to that date. (Tr. @ 209). Since Montesano had also spoken to Hodge about K.D.'s injury, Superintendent Marks testified that he had an obligation to report it. (Tr. @ 595-596).

In effect, the District has held the Respondent primarily accountable for not exercising "due diligence" in investigating and reporting the January 9th incident when other staff with either earlier or the same information regarding K.D.'s injury did not do so. No action was taken against Hammond-Dudley, although she had an obligation to report the injury to Montesano, Petrella, or both. No action was taken against the trainer, Mr. Castano, although he first spoke to K.D. and treated her injury. However, the Athletic Director, to whom all of these other employees reported, had a higher responsibility to investigate and report to his superiors.

During the Superintendent's investigation, no statements were obtained from Hodge, Hammond-Dudley or Castano. As the Respondent correctly observes, other than the Google document that Petrella asked Hammond-Dudley to write-up, there is no additional documentary evidence of the incident. Superintendent Marks faults Petrella with "never communicat[ing] initially with the principal or with the central office." Although it cannot be shown that the Athletic Director had the exclusive responsibility to report an injury, in his capacity as

Athletic Director, Petrella can reasonably be held equally accountable as the principal, who had the injury information at the same time, and less accountable than his subordinates Hammond-Dudley, Hodge, and Castano, who had information concerning K.D.'s injury before Petrella**.**

Petrella is clearly guilty of Count 8 because he did not notify Montesano on January 10th after he spoke to Coaches Hodge and Hammond-Dudley. However, this count is mitigated by evidence that Principal Montesano had the same Hodge information as Petrella and did not report it to the Central Office. Nevertheless, Petrella had an independent obligation to report the injury, even though Montesano, Hammond-Dudley and Castano had not.

Petrella testified that he called Montesano on his work phone at least on three (3) occasions on January 10th and 11th but did not get a call back. (Tr. @ 859). However, Petrella did not call him on his cell phone, text, or email him. (Tr. @ 991). Montesano testified that he first learned of the injury from Assistant Superintendent Parchment on January 12th. (Tr. @ 87). Parchment called Petrella on January 12th to ask him if a student had gotten injured. She then said, "I need you to call Jim Montesano and report this right away." As a result, on January 12th, Petrella first spoke to Montesano regarding the injury.

That others were remiss in their responsibilities does not absolve the Athletic Director of exercising due diligence, particularly when the injury occurred during an athletic event. Petrella's delay in directing Hodge and Castano to submit an Accident Report caused a further delay until January 16th after he was directed to do so by the Superintendent on January 12th

Accordingly, the Respondent is guilty of Count 8.

With respect Count No. 9 and District Policy #8442 – Reporting Accidents, the District has similarly held Respondent solely accountable for not reporting K.D.'s injury on January 9th when the evidence indicates that he first received any information about her injury on January 10th from Hodge – albeit erroneous information that she had burned her fingers.

In pertinent part, the Accident Policy reads: "Any accident that results in an injury, however slight, to a student, an employee of the Board, or to a visitor to the schools must be reported promptly and in writing to the district business office." The 24-hour reporting requirement pertains to "[a]ny employee of the Board who suffers a job-related injury."

District Policy #8441 – Care of Injured and Ill Persons provides that "the Board of Education will provide prompt and appropriate medical attention for students, staff members or visitors who are injured or become ill on school grounds or during a school sponsored event, activity, or field trip. Any injury or illness shall be reported immediately to the school nurse or, in the absence of the school nurse, the Building principal or designee."

Given this language, the Arbitrator maintains that the employee of the Board who first treated K.D., namely Trainer Castano, had the initial obligation to report the injury to the district business office and/or Principal Montesano. Since Montesano did not attend the Basketball game, both Hammond-Dudley and Castano were obligated to report K.D.'s injury to Petrella – the principal's designee – on January 9th. The Accident Report form states that "In case of

serious accident, notify Central Office immediately. In any case, reports must be submitted with 48 hours." However, the Accident Report form was not submitted until January 16, 2018 after Petrella had received an accurate account of the incident via Hammond-Dudley's Google document submitted on January 15th.

Inasmuch as Castano had the necessary information during the game and Hammond-Dudley had the requisite information after the game, both were in a better position than Petrella to fill out the Accident Report. Ms. Skiba, the athletic trainer, signed the report and Petrella co-signed it. It is noteworthy that Montesano neither told Coach Hodge to tile an accident report nor reported what Hodge had told him to the Central Office.

Moreover, Mr. Dass, the prior Athletic Director, testified credibly that submitting Accident Reports was not the job of the Athletic Director. Both Dass and Petrella agreed that it was the task of the coach or the trainer to submit the report. The District maintains that Petrella should have submitted the report on January 10th when he spoke to Hodge; however, Hodge could not provide a first account of the injury. Although Hodge's account was subsequently found to be erroneous, the Respondent's delay until he received Hammond-Dudley's written version on January 15th was not reasonable.

The weight of the evidence persuades the Arbitrator that Petrella had an obligation to report the injury-accident on January 10th – even before he had received a full accounting from Hammond-Dudley via Google document on January 15th.

Respondent is guilty of Count Nine because there is no indication that the Athletic Director directed Hodge or Hammond-Dudley to submit an accident report once he was informed of the accident on January 10th. Whereas the testimony of Dass that it was not the task of the Athletic Director to submit Accident Reports corroborates the Respondent's testimony, the Respondent was obligated to ensure that this function was fulfilled by his subordinates. Although the employees who were on-site where the accident occurred or when K.D. was treated had the primary obligation to submit the accident report, once Petrella realized that no report had been submitted as of January 10th he should have directed its submission. Either the part-time trainer,* or the Head Coach was responsible for filing the report on January 9th. Accordingly, Charge Seven, Count Nine, is sustained.

Charge Seven, Count 10 is dismissed. District Policy #8442 – Reporting Accidents, places the responsibility for reporting accidents for an injured student on the "staff member responsible for an injured student…" The responsible staff member in this case was Coach Hammond-Dudley. Although the Respondent became responsible once directed by the Superintendent, the initial responsibility was that of the Coach.

On January 10th, Petrella had information from Hodge that an accident had occurred. A proactive response on Petrella's part would have resulted in the Accident Report being submitted before January 16, 2018, The Respondent is guilty of Count Eleven because, even though he did not have the primary

* There is some evidence that the part-time trainer was discouraged from filing accident reports by the trainer.

responsibility of filing the Accident Report, once he spoke to Hammond-Dudley and Hodge, he should have ensured that the incident was promptly reported and the Accident Report submitted before the Superintendent directed him to do so on January 12, 2018. The report was not submitted until January 16, 2018.

Respondent is guilty of Charge 7, Count 12 because on January 10th, he had information from Hodge that an accident had occurred. A proactive response on his part would have resulted in the Accident Report being submitted before January 16, 2018. Accordingly, Count 12 is sustained.

In Charge Eight, Count One the Respondent is alleged to have misrepresented several facts. In his misdated memorandum submitted on January 15, 2018, the Respondent wrote, inter alia, "I was informed Wednesday, January 10, 2018 by Coach Hodge that the young lady had burned her fingers while serving a 'hot dog' at the concession stand." (D. Ex. #11). According to the District, this statement was erroneous because "Petrella subsequently stated that he had learned of the incident during the January 9, 2018 basketball game." For this Count, the District relies on the hearsay testimony on January 22, 2018 of Montesano that "you later contradicted that statement by indicating you were informed of the burn during the January 9th contest." (Tr. @ 453) (D. Ex. #14).

In the Arbitrator's opinion, in the absence of any corroboration of Montesano's testimony or his statement which memorializes his testimony, this allegation must be dismissed. The credible evidence establishes that Petrella first learned of K.D.'s injury on January 10th from Coach Hodge. Accordingly, Charge 8, Count One, is dismissed.

In Count Two, the Respondent is accused of a misrepresentation when, in his February 15, 2018 response to the January 22, 2018 memorandum from Principal Montesano he stated, “Had I known that the snack bar was not being supervised by an adult, I would have addressed the situation.” Having promoted Assistant Coach Hammond-Dudley to Head Coach, “made the arrangements for the snack bar to be supervised by the assistant basketball coach and did not secure an alternate to supervise the snack bar during HHS girls’ basketball games,” the District alleges that his statement constitutes a misrepresentation of the facts he knew or should have known.

The Respondent also displayed a lack of candor when he did not reveal during the investigation that he had seen K.D. injured during the game.

The Arbitrator finds that the Respondent should have known that the concession stand at the Girls’ Basketball games was not being supervised by an adult. Although a past practice supported his delegation of this task to the coach, he was not absolved of the responsibility of ensuring that the activity was safe and properly supervised.

Charge Nine is an omnibus charge which states that “[e]ven if any of the foregoing charges individually does not constitute unbecoming conduct, all of the foregoing charges considered as a whole demonstrate a pattern of inappropriate behavior which cannot continue in a public school setting and constitute conduct unbecoming a teaching staff member precluding Respondent from performing the functions of a teaching staff member and/or other just cause for termination.”

Based upon the foregoing charges proven by preponderant evidence, the District has proven Charge Ten as well.

The Respondent is also guilty of Charge Nine, a charge that incorporates the prior charges by reference. The Arbitrator finds that the Respondent has collectively and individually committed conduct unbecoming a staff member given the Charges/Counts wherein misconduct has been substantiated.

The Respondent violated District Policy # 3281 which states, inter alia, that "Inappropriate conduct and conduct unbecoming a staff member will not be tolerated in this school district." Since the Respondent is charged with constructive knowledge of all District policies pursuant to his position of Athletic Director, he is accountable for their violation.

Conclusion

The Arbitrator has found the Respondent guilty of Charge One, Counts 1-4; Charge Three, Counts 3-8; Charge Four; Charge Seven, Counts 1-3, 6-9 and 11-12; Charge 8, Count 2; Charge 9. The Arbitrator has dismissed Charge Two; Charge Five; Charge Six; Charge Seven, Counts 4, 5 and 10; and Charge 8, Count 1. Considering these Charges in the aggregate, the Arbitrator is persuaded that the District has met its burden of proof by a preponderance of the credible evidence.

In finding that the District has provided preponderant evidence of conduct unbecoming an administrator, the Arbitrator notes that the District has proven several counts or specifications of such misconduct, including failing to ensure that all coaches were informed of District protocols regarding the use of practice

facilities, ignoring an administrative directive to utilize the time card system to punch in/out for at least one month, making a highly inappropriate comment to new teaching staff members on how to date students without getting in trouble, failing to ensure that several coaches had current First Aid/CPR, concussions and heat acclimation certifications, failing to ensure that the concession stand at the Girls' Basketball games were properly supervised by an adult, failure to ensure that an Accident Report was submitted by his subordinates once he became aware of a student's injury, and violating the District protocols, policies or procedures related to the above infractions.

In finding that Respondent has committed conduct unbecoming on several occasions, the Arbitrator further finds just cause for his dismissal.

It is well-established that a teacher can be terminated for insubordination which the Respondent's failure to punch in or out during May 2014 entailed. The Respondent disregarded the directive of Superintendent Lewis that he punch in/out. And, although this charge is mitigated by the waiver former Superintendent Abate gave him when moving from building to building, Respondent's conduct exceeded the latitude provided by the waiver.

In I/M/O Freddie Williams, (DKT. No. 4579-028), the Respondent was terminated for unbecoming conduct when he did not clock out at the end of his shift, even though there was no specific rule or policy in place. He had received admonitions that placed him on notice.

In the final analysis, balancing the proven charges of conduct unbecoming against the mitigating circumstances for the proven charges and the charges

dismissed, the Arbitrator finds sufficient evidence to uphold the dismissal of the Respondent from his tenured employment as Athletic Director for the Hackensack Public Schools.

Although the Respondent received a satisfactory summative evaluation on June 28, 2016, by his mid-year evaluation on February 20, 2018, he was rated partially effective (2) on several domains, including domain evidence that “he lacked over[sight] in the management and operational systems in the athletics and physical education departments. This is evidenced by the lack of procedures for selling items during the Girls’ Basketball game and due to the lack of procedures, a girl was injured.” (D. Ex. #2). There is a nexus between the Respondent’s performance and the conduct unbecoming that he has been shown to have committed.

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NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

(1) The District has met its burden of proving its tenure charges by establishing that the Respondent, David Petrella, engaged in conduct unbecoming a staff member. The Respondent has been proven guilty of Charge One, Counts 1-4; Charge Three, Counts 3-8; Charge Four; Charge Seven, Counts 1-3, 6-9 and 11-12; Charge Eight, Count 1. The Arbitrator has dismissed Charge Two; Charges 5 and 6; Charge Seven, Counts 4, 5 and 10; Charge Eight, Count 1.

(2) As a remedy, the Respondent, David Petrella, shall be dismissed from his tenured employment as Athletic Director for the Hackensack Public Schools.

(3) The Arbitrator will retain jurisdiction sine die to address any issues that may arise in the interpretation or implementation of the remedy portion of this award.

Robert T. Simmelkjaer
Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

On the 18th day of May 2019, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, and he acknowledged to me that he executed his Award in Agency Docket No. 292-11/18 upholding the tenure charges as set forth above.

May 18, 2019 _____
Notary Public

June 21, 2019

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Re: I/M/O David Petrella and Hackensack Board of Education
Agency Dkt. No. 292-11/18
Clarification of Arbitration Award

Dear Counsel:

On May 18, 2019, the undersigned Arbitrator issued his Award in the above matter. The Award reads as follows:

(1) The District has met its burden of proving its tenure charges by establishing that the Respondent, David Petrella, engaged in conduct unbecoming a staff member. The Respondent has been proven guilty of Charge One, Counts 1-4; Charge Three, Counts 3-8; Charge Four; Charge Seven, Counts 1-3, 6-9 and 11-12; Charge Eight, Count 2; Charge Nine. The Arbitrator has dismissed Charge Two; Charges 5 and 6; Charge Seven, Counts 4, 5 and 10; Charge Eight, Count 1.

(2) As a remedy, the Respondent, David Petrella, shall be dismissed from his tenured employment as Athletic Director for the Hackensack Public Schools.

(3) The Arbitrator will retain jurisdiction sine die to address any issues that may arise in the interpretation or implementation of the remedy portion of this award.

In reaching this conclusion, the Arbitrator found that Respondent, *inter alia,* had committed nineteen counts of conduct unbecoming, namely, Charge One,

Counts 1-4; Charge Three, Counts 3-8; Charge Four; Charge Seven, Counts 1-3, 6-9, and 11-12; Charge Eight, Count 2; Charge Nine. Given these findings, the Arbitrator further found that Mr. Petrella "shall be dismissed from his tenured employment as Athletic Director for the Hackensack Public Schools."

Since the issuance of the Award, an issue has arisen with respect to whether the termination penalty imposed on Mr. Petrella applied only to his tenured position as Athletic Director but also whether it applied to all tenured rights he holds in the District.

The Respondent has relied on the Arbitrator's email and teleconference response to a question regarding the scope of the Respondent's removal. The Arbitrator responded that Petrella was only being removed from his position as Athletic Director.

This response was incomplete. In responding to the question, the Arbitrator focused on the evidentiary basis for his decision, which exclusively encompassed the Respondent's performance and position as Athletic Director, with no reference to any other tenure rights the Respondent holds in the District. However, the decision to dismiss Respondent from his tenured employment as Athletic Director was tantamount to revoking all of the Respondent's tenure rights in the District, including all of the tenured positions that he has held.

In retrospect and to clarify the intent of the Award, the Arbitrator refers to his written decision – which is the best evidence of his intent – where I unequivocally found that "Respondent has committed conduct unbecoming a staff member given the Charges/Counts wherein misconduct has been substantiated." Moreover, the Opinion (p. 70) states that "Respondent has committed conduct unbecoming on several occasions," providing "just cause for his dismissal."

Contrary to the Respondent's assertion that the Arbitrator "fashion a remedy limiting Mr. Petrella's removal from only the current position held," the Arbitrator maintains that he has no authority to effectuate a remedy that would constitute a demotion. Not only did the issue presented to the Arbitrator entail, "whether the Respondent, Petrella, had demonstrated conduct unbecoming a public educator sufficient to warrant the termination of his employment and revocation of his tenure," but there also was no evidence adduced on the question of demotion. Given the holding of the New Jersey Supreme Court in Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J.4 (2017) that the arbitrator's award in a tenure case "should be consonant with the matter submitted" any decision to demote Respondent would exceed his authority. In addition, the Court in Ciripompa referred to the 2012 amendment to N.J.S.A. 18A:6-16, NJ TEACH, specifically the four bases upon which a court may vacate an arbitral award. Among the grounds for vacating an award is:

(d) Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

Having found in Charge Nine, an omnibus charge, that "the Respondent has collectively and individually committed conduct unbecoming a staff member" and that "all of the foregoing charges considered as a whole demonstrate a pattern of inappropriate behavior which cannot be continued in a public school setting…," it is clear that the Arbitrator never considered demotion as an option. As the District correctly notes, the Arbitrator would exceed his authority to include an ultra vires penalty, namely demotion. Whereas the Arbitrator, upon referral of the tenure charges from the Commissioner, who determined the sufficiency of the tenure charge "to warrant dismissal or reduction in salary of the person charged," had the discretion to determine if the conduct complained of in the Notice of Tenure Charges was factually sufficient to warrant dismissal or reduction in salary (suspension), in the instant case the Arbitrator has found that dismissal is the appropriate penalty.

Since the Arbitrator's authority is circumscribed by the statutory provision set forth in N.J.S.A. 18A:6-16, which is to determine whether the tenure charge "warrant(s) dismissal or reduction in the salary of the person charged," the Arbitrator's decision to "dismiss the Respondent from his tenured employment as Athletic Director necessarily requires the complete termination of his employment with the District.

The cases cited by the Respondent are distinguishable from the instant case. In Matter of Brenda Bruni and Bernards Township Board of Education (Agency Dkt. No. 207-9/17, the Arbitrator sustained two counts of conduct unbecoming, "involving a single instance of poor judgment – motivated by concern for an ailing family member … ," but found that the proven allegations did not provide just cause for removal. In the instant case, the Arbitrator has found "a pattern of inappropriate behavior which cannot continue in a public school setting, comprised of nineteen counts," and just cause for removal.

In Orleans Sarmiento and School District of the Township of Saddle Brook (Agency Dkt. No. 79-4/17), the Arbitrator found that "the Board of Education did not prove that tenure charges of conduct unbecoming should be sustained for Respondent's behavior." Unlike the instant case where this Arbitrator found the Respondent guilty of nineteen (19) counts of conduct unbecoming, the Respondent in Saddle Brook was fully exonerated of the conduct unbecoming charges, and "reinstated to her former positions in the District with no loss of seniority or benefits," although suspended for 120 days without pay.

I/M/O Laurie Olsen-DelGuercio and School District of the Township of Union, the Arbitrator, despite finding the Respondent negligent for having "placed school funds in a locked file cabinet overnight and kept money in the school safe rather than depositing it in a bank," did not find her behavior "inherently unbecoming." This

finding of negligence resulted in a 120-day suspension but not the revocation of tenure rights. Here again, this case is distinguishable from the instant case where charges delineating a pattern of conduct unbecoming were sustained.

In Matter of Christopher Masullo of the South Hackensack Board of Education (Dkt. No. 1-1/17), the Arbitrator found that one charge of conduct unbecoming had been proven and provided just cause for discipline. As discipline, the Respondent was suspended for the 2016-2017 school year "and his increment for the 2016-2017 school year (if any) was withheld." Clearly, the magnitude of the conduct unbecoming charges in the instant case far exceed those of Masullo which was limited to a single incident as opposed to a pattern of misconduct.

It is noteworthy that the Arbitrator in Masullo considered the Fulcomer factors set forth I/M/O Fulcomer, 93 N.J. Super 404 (Super Ct., App. Div. 1967) in reaching his decision. These factors include: 1) the teacher's ability, record and length of service; 2) the teacher's disciplinary record; and 3) the "impact of the penalty on the [teacher's] career, including the difficulty which would confront him as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in the State."

Although the Arbitrator in the instant case did not address the Fulcomer factors per se in his decision, the mitigating evidence that was adduced regarding several charges was neither deemed sufficient to dismiss any specific charge nor to reduce the penalty of termination for which the Arbitrator found preponderant evidence constituting conduct unbecoming a teaching staff member.

Based on the foregoing analysis, the Arbitrator concludes that the only appropriate amendment/clarification to his award is as follows: The District is not required to reemploy Petrella in any capacity.

Respondent's 120-Day Suspension

With respect to the period of the 120 day suspension without pay, this matter is governed by statute, N.J.S.A. 18A:6-14, which provides in pertinent part:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension…

On March 23, 2018, the Respondent was suspended without pay and remained on suspension until on or about December 1, 2018.

A reasonable inference to be drawn from the above statutory language is that the Legislature, having made provision for reimbursement of the 120 days of salary upon dismissal of the charge(s), but no provision for reimbursement should the charge(s) be sustained, intended that no reimbursement be provided to the Respondent if s(he) was found to be guilty of the charge(s).

An alternative inference, which the Respondent urges, leaves the matter of reimbursement for the 120 days or a fewer number of days to the discretion of the arbitrator.

Since the statute provides reimbursement of the 120 days only in conjunction with reinstatement, the Arbitrator's concludes that the District is not required to reinstate or reemploy the Respondent in any capacity, given his finding that the charges of unbecoming conduct have been sustained. This statutory interpretation renders moot the issue of reimbursement of Respondent's salary during his 120-day suspension pursuant to N.J.S.A. 18A:6-14.

Accordingly, the Respondent shall not be reimbursed for the 120 days he was suspended.

The Award is amended as follows:

FINAL AWARD

(1) The District has met its burden of proving its tenure charges by establishing that the Respondent, David Petrella, engaged in conduct unbecoming a staff member. The Respondent has been proven guilty of Charge One, Counts 1-4; Charge Three, Counts 3-8; Charge Four; Charge Seven, Counts 1-3, 6-9 and 11-12; Charge Eight, Count 2; Charge Nine. The Arbitrator has dismissed Charge Two; Charges 5 and 6; Charge Seven, Counts 4, 5 and 10; Charge Eight, Count 1.

(2) As a remedy, the Respondent, David Petrella, shall be dismissed from his tenured employment as Athletic Director for the Hackensack Public Schools.

3) The District is not required to reemploy or reinstate the Respondent in any capacity.

4) The Respondent is not entitled to reimbursement of his salary during his 120-day suspension pursuant to N.J.S.A. 18A:6-14.

5) The Arbitrator's status, having issued his Final Award, is *functus officio.*

Robert T. Simmelkjaer

June 21 2019 Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN} SS

On the 21st day of June 2019, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument, and he acknowledged to me that he executed his Award in Agency Docket No. 292-11/18 upholding the tenure charges as set forth above.

_____

June 21, 2019 Notary Public